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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 128

In Re BARBARA BURRUS, ET AL.,

Petitioners,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF THE NATIONAL COUNCIL OF JUVENILE COURT JUDGES AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTRODUCTORY STATEMENT

The facts of this cause, which involves the consolidated cases of forty-four (44) juvenile petitioners, the pertinent constitutional provisions, the applicable provisions of the North Carolina statutes, the questions presented, the opinion of the North Carolina Supreme Court and those of the North Carolina Court of Appeals are set out in the brief and appendix filed by the petitioners.[1] The *amicus* accepts them for

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[1]The opinion of the Supreme Court of North Carolina in this case is officially reported at 275 N.C. 157, 169 S.E.2d 879 (1969). The opinions of the North Carolina Court of Appeals are officially reported at 4 N.C. Apps. 523, 167 S.E.2d (1969) and 5 N.C. Apps. 487, 168 S.E.2d 695 (1969).

purposes of its own brief. Counsel for both parties have given their written consents to the filing of this *amicus curiae* brief in behalf of the National Council of Juvenile Court Judges.[2] In addition, the State of North Carolina, respondent herein, has agreed to yield 10 minutes of its time for oral argument to this *amicus*.

THE INTEREST OF THE AMICUS AND ITS POSITION ON THE QUESTIONS PRESENTED

A. *Interest of the Amicus.* The National Council of Juvenile Court Judges is an unincorporated association. More than 1,000 of its members are judges of the various States and the District of Columbia, vested with jurisdiction to determine juvenile cases. The judge members of the Council handle approximately 90% of the juvenile cases which are filed each year in the courts of the Nation.

It has always been the Council's belief that juvenile courts are courts of law and not social agencies. From its inception, the Council has adhered to the view that both legislation and judicial decisions in the field should be constantly studied to the end that due process of law and essential fairness to the troubled children who come before the juvenile court not be denied because of informalities of procedure that might lead to arbitrariness. Nevertheless, from ancient times children necessarily have been subject to prohibitions in the law which are not imposed upon adults. And juvenile courts, from their beginnings, have dealt almost daily with some of the practical legal problems and complexities arising from the special place that the law assigns children.

In pursuing its objectives, it has been the practice of the Council to provide legislatures and courts of last resort with the results of its collective knowledge and experience in the hope of illuminating problems that are not always fully

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[2]Hereinafter usually referred to as the "Council".

appreciated by many attorneys who rarely practice in the juvenile court, and who, when they do come into that court, are not always equipped by experience and training to distinguish between the principal focus of the criminal law—deterrence and retribution—and the principal focus of the juvenile court—reformation of a child, rather than his punishment.

B. *The Council's Position on the Issues.* This case, for the third time in recent years, provides an occasion for the Court to decide whether the Sixth Amendment, as applied to the States through the Fourteenth Amendment, requires that a juvenile be provided with an opportunity for a trial by jury before he can be adjudged a delinquent where the penalty to which he might be exposed would require a criminal trial should an adult have been so charged.[3]

The Council's basic interest in this case is that a long tested and enlightened system for the administration of justice for juveniles—a system which adheres to standards of fundamental fairness—not be jeopardized by a rigid insistence that the best interests, including adequate protection of their constitutional rights, of children not charged with crimes, can be realized only by treating them as if they were adults and so charged. The position which the Council takes in this case is identical to the position it asserts with respect to the companion case of *James McKiever and Edward Terry v. Commonwealth of Pennsylvania*, No. 322, which has been consolidated for argument with this case.[4] While the broad interests of the Council fortuitously may be allied with the

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[3]The Council participated as *amicus curiae* in two earlier cases that brought this same question to the Court. *In Re Whittington*, 391 U.S. 341 (1968), and *DeBacker v. Brainard*, 396 U.S. 28 (1969). The Council filed briefs and argued orally in both cases.

[4]The Council has not filed a separate *amicus curiae* brief in *McKiever* but wishes to make clear that it supports the appellee in that case in urging that the decision of the Pennsylvania Supreme Court should be affirmed, for the same reasons that it supports affirmance of the ruling of the North Carolina Supreme Court in this case.

more specific concerns of the respondent here and the appellee in *McKiever*, the Council takes no position on the more narrow question of the correctness of the adjudications of delinquency involved in the two cases. Rather, the Council appears in this Court solely in an attempt to present the collective knowledge and experience of its members on issues of undeniable importance to the future operation and development of juvenile court justice in the United States.

It is the Council's basic position that the twin goals of affording due process in juvenile court proceedings and at the same time preserving the reformative and rehabilitative goals of modern juvenile court systems can be achieved best by *not* requiring a jury trial in juvenile court proceedings.

SUMMARY OF ARGUMENT

I

A. The decisions of this Court on which petitioners rely in arguing that there is a constitutional right of a jury trial in the juvenile court were all cases in which the decision of the Court was arrived at through the selective absorption of certain rights guaranteed by the Bill of Rights. In each, the Court found that the denial of the particular right would be a departure from "fundamental fairness". That is the same analysis which the Court should follow in deciding whether the Sixth Amendment, as applied against the states through the Fourteenth Amendment, requires a jury trial in adjudicatory hearings conducted by the juvenile courts of the various states.

On the other hand, the petitioners' argument that the Fourteenth Amendment requires a jury trial in a juvenile court adjudication proceeds from the simplistic view that the recent decisions of this Court holding that juvenile adjudications are subject to the standards of the Due Process Clause and that due process guarantees a jury trial in state criminal proceedings and, therefore requires that the right

to a jury trial must apply to juvenile adjudications. It is *amicus's* position that this Court in pursuing the constitutional domestication of juvenile court adjudications has not proceeded with a broad brush approach of the type suggested by the petitioners. Rather, in each case, the Court has made a searching evaluation of those procedural safeguards applied in criminal proceedings that are at the very heart of assuring fundamental fairness in adjudications carrying the threat of serious loss of liberty, viewed in light of the effect of the imposition of those safeguards upon the recognized advantages of the distinctive methods of adjudication long followed in the juvenile courts. We have no quarrel with the previous decisions of this Court, which, to be sure, have enunciated standards requiring substantial changes in juvenile court procedures, but not changes which have imposed critical inhibitions upon the goal of expeditious and flexible adjudications which would be the case if the jury trial is made a constitutional prerequisite in an adjudication of juvenile delinquency.

In the landmark case of *In Re Gault*, 381 U.S. 1 (1967), there was no indication that this Court intended to fasten on juvenile court proceedings all the procedural standards required by the Fourteenth Amondment in criminal proceedings. Actually, the constitutional rights which *Gault* articulated as requirements in the juvenile court were rights which are nearly co-terminus with the minimum standards of fair procedure required for proceedings in most civil cases. The *Gault* decision and the other decisions of this Court upon which petitioners rely, therefore, do not establish that there is an automatic congruence between the procedural requirements imposed by due process in a criminal case and those imposed by due process in juvenile cases.

There is a basic supporting justification for distinguishing between criminal proceedings and those of the juvenile court. That distinction lies in the fact of a child's immaturity, a condition which is not usually presumed of adults. That condition of immaturity has been impliedly recognized by this Court in sanctioning legislative restriction of a child's

free exercise of religion rights and his right of free speech, when necessary for his protection. Do a child's due process rights occupy a higher plane than his First Amendment freedoms?

B. The critical issue in determining whether due process requires application of the Sixth Amendment's right to a jury trial in juvenile court proceedings is whether that right is so fundamental that a proceeding conducted in its absence must be said to be intrinsically unfair. *Duncan v. Louisiana*, 391 U.S. 145 (1968), does not argue to the contrary and is distinguishable from the case at bar in that the jury right sustained in that case in criminal proceedings has enjoyed long continued and universal acceptance in all American jurisdictions. Similarly, *In Re Winship*, 397 U.S. 358 (1970), where this Court held that the reasonable doubt standard was applicable both to criminal proceedings and juvenile court adjudications, also presented a situation where there was virtually unanimous adherence to the reasonable doubt standard in all common law jurisidctions since the Nation's beginnings.

At the present time, thirty-four states deny the juvenile a right to trial by jury in cases such as this. Eleven other jurisdictions grant the right, but only upon demand. Of the remaining five states, it is very probable that four of them would not grant a jury trial if the question were directly raised for decision. And even in those states where the jury trial is provided for in juvenile court proceedings, exercise of that right, at least prior to this Court's decision in *Gault*, was a very rare occurrence.

Not only has the right to a jury trial in juvenile courts been denied both by legislative action and court decision, but the opinions of the scholars and the experts in the field, with a rarely encountered dissent, have opposed the incorporation of the jury trial into juvenile court proceedings.

Nor can it be argued, as it could be in contending that the reasonable doubt standard should be observed in juvenile courts, that the jury trial is required as "a prime

instrument for reducing the risk of convictions resting on fundamental error and preserving the presumption of innocence." Indeed, as a result of this Court's decision in *Winship*, juvenile court judges now must apply the reasonable doubt standard in any future adjudication of delinquency.

Putting unenlightening labels aside, it remains true that the juvenile court system, like American administrative law, is *sui generis*. It finds analogies for the procedures it observes in other areas of the law, but the system maintains its own unique nature which was specially fashioned in order to achieve the particular purposes for which it was created.

Before transferring the jury system *in toto* to the juvenile court, some consideration should be given to the relative merits of jurors, as opposed to judges, as instruments of fair and effective factfinding. Recent studies have produced persuasive findings that juries are not significantly better equipped to find the facts than judges are. And juries can be as arbitrary as judges. However, whatever the precise merit or stature of the jury trial in criminal cases, its desirability in other proceedings is sufficiently debatable to preclude accepting its status as a fundamental necessity required by due process in juvenile court proceedings.

C. In addition, there are several substantial adverse practical consequences which might ensue if the jury trial were to be required in juvenile cases. It is it injected into the juvenile trial, it will bring with it the traditional delay, formality and inevitable "clash and clamor" of adversary proceedings with which adult jury trials so frequently are permeated. Congress took note of these accouterments of the jury trial when it very recently abolished "the cumbersome and inappropriate trial by jury formerly provided by statute in the District of Columbia." Both friends and foes of proposals to cut back some of the procedural protections enjoyed by the criminally-accused agree that the extended delays which now occur between a criminal charge and its final disposition are an abomination, unfair to many defendants and frequently gravely hurtful to the peace and security

of law-abiding citizens. The substantial contribution of the jury trial to this unpardonable delay argues strongly against its introduction into the juvenile court system, which, if it is to work at all, must set in motion at the earliest possible moment whatever special facilities and techniques it may have for the counselling, treatment, rehabilitation and reform of a troubled child. Unlike the reasonable doubt standard, which this Court required in both criminal and juvenile proceedings in *Winship, supra,* there is no question that the imposition of the jury trial in the juvenile court setting would have a significant adverse "effect on the informality, flexibility . . . [and] speed of the hearing . . ." 397 U.S. at 366.

With the jury trial will come the "public trial" required by the Sixth Amendment. The Council has the gravest doubts that anyone in this day of the widest possible news coverage by the communications media can point to any salutary effects—either from the point of view of the juvenile or from that of society—to be achieved by making adjudications of juvenile delinquency public proceedings.

A decision announcing the existence of a right to trial by jury in the juvenile court would put in question other concomitants of the right to trial by jury, such as the necessity of a unanimous verdict of such a jury. In addition, the equation of the juvenile court with the criminal court for purposes of incorporating a constitutional right to a jury trial will raise other issues concerning other processes which result in loss of liberty, such as mental commitment procedures and dependency hearings.

II

Although not expressly raised, it may be argued that denying a juvenile a jury trial where an adult would receive one in a criminal proceeding constitutes a violation of equal protection. Such an argument should be unavailing. There are many distinctions in the treatment of children recognized

in the law which are long established and well accepted. In all of them, it is the condition of being a child and the presumption of immaturity which attaches to that condition which both explains and justifies the difference in the law's treatment of the juvenile as opposed to the adult. The same reasons that justify the conclusion that due process does not require a jury trial serve also to support the conclusion that the Equal Protection Clause is not violated if he is denied the jury trial right. At the root of both conclusions is the ancient assumption, overwhelmingly supported by the teachings of psychology, biology, physiology, sociology and ordinary human experience, that a child is not the same as an adult. Therefore, treating him as a child and not as an adult is not unconstitutional, provided that he is treated fairly.

QUESTIONS PRESENTED

The determinative issue here is whether the Sixth Amendment, as applied to the States through the Due Process Clause of the Fourteenth Amendment, requires a trial by jury of a juvenile in a juvenile court for an offense which, if committed by an adult, would require a jury trial if requested. Additionally, however, though not expressly raised below, the issue presented may carry equal protection implications; *i.e.*, is it an invidious discrimination not to provide the opportunity for a trial by jury to a juvenile where it would be provided if an adult were involved in the same situation? For the reasons which it states below, the Council believes that both of these questions should be answered in the negative.

ARGUMENT

I. DUE PROCESS DOES NOT REQUIRE THE RIGHT OF A JURY TRIAL FOR A JUVENILE

In order to answer the basic constitutional question presented in this case and in the *McKiever* case, it first must be determined whether the meaning and scope of the due process to be applied in an adjudication of juvenile delinquency is to be arrived at through a selective absorption of rights specified in the Bill of Rights or through the full scale incorporation of those rights as part of the guarantees afforded by the Fourteenth Amendment. The *amicus* maintains: (1) that the due process requirements that must be observed in an adjudication of juvenile delinquency should be determined through a process of selective absorption of the rights contained in the Bill of Rights according to a standard that will assure "fundamental fairness" to the juvenile; (2) that, so interpreted and applied, due process does not require a jury trial in juvenile court proceedings; and (3) that, in addition, the serious adverse practical consequences that will follow if a jury trial is required in juvenile court proceedings argue strongly against the imposition of a jury trial requirement.

A. *Fundamental Fairness Is the Applicable Standard.* The petitioners in this case and those in the companion *McKiever* case take their stand essentially on the basis of four decisions of this Court. The first is *In Re Gault*, 387 U.S. 1 (1967). The other three are *Duncan v. Louisiana*, 391 U.S. 145 (1968), *Bloom v. Illinois*, 391 U.S. 194 (1968), and *In Re Winship*, 397 U.S. 358 (1970). Whatever the petitioners can make of these four decisions, they have one undisputed common denominator. In each, this Court arrived at a result favorable to the defendant by the selective absorption of certain rights guaranteed by the Bill of Rights to the particular case at hand, finding in each instance that the denial of the particular right would be a departure from "fundamental fairness". That analysis, this *amicus* contends, is precisely the one which the Court should follow in decid-

ing whether the Sixth Amendment, as applied against state action by the Fourteenth Amendment, requires a jury trial in adjudicatory hearings conducted by the juvenile courts of the various states.

On the other hand, petitioners argue that the Fourteenth amendment requires the right to a jury trial in any juvenile court adjudication carrying the threat of a serious deprivation of liberty. Their argument here proceeds from a rather simplistic view of the Court's recent decisions determining the fundamental requirements of due process in juvenile court adjudications and determining, with respect to criminal proceedings carrying the threat of serious deprivations of liberty, that the Fourteenth Amendment includes the Sixth Amendment's jury trial guarantee. Basically, the argument is that the Court has determined in *Gault* and *Winship* that juvenile court adjudications are subject to the standards of the due process clause, and the Court has determined as well in *Duncan* and *Bloom* that the due process clause guarantees a jury trial in state criminal proceedings, and, therefore, the right to a jury trial must apply to juvenile adjudications.

The basic flaw in petitioners' argument is that, while the Court in *Gault* rejected the rigid concept that juvenile court adjudications are civil and therefore free from any due process limitations applied in criminal proceedings, the Court also rejected, both in *Gault* and *Winship*, any procrustean application of all of the due process requirements in criminal proceedings to juvenile court adjudications. Rather, the Court made clear in *Winship* that its decision in *Gault* imposed upon juvenile court adjudications only the "essentials of due process and fair treatment" and not that "the hearing at this stage conform with all the requirements of a criminal trial or even of the usual administrative proceeding . . . ." 397 U.S., at 359. Indeed, the Court in *Winship* specifically rejected the position of the dissent that its *Winship* opinion adopted the premise that juvenile court adjudications may be equated fully with "criminal prosecutions . . . ." *Id.*, at n. 1.

The position of this Court in the constitutional domestication of the juvenile court adjudications simply has not proceeded upon the kind of broad brush approach suggested by the petitioners, and the Council here urges only that the Court continue the approach followed in *Gault* and in *Winship*—a searching evaluation of those procedural safeguards applied in criminal proceedings that are at the very heart of assuring fundamental fairness in adjudications carrying the threat of serious loss of liberty, viewed in light of the effect of the imposition of those safeguards upon the recognized advantages of the distinctive methods of adjudication long followed in juvenile courts. Application of that approach here, we contend, leads to the conclusion that the right of jury trial is not constitutionally required in juvenile court adjudications, nor does it carry advantages outweighing its adverse effect upon the goal of expeditious and comparatively informal adjudication of juvenile delinquency.

The Council has no quarrel now, nor did it at the time that the cases were before this Court, with the results in *Gault* and *Winship*. But it requires no denigration of the values implicit in trial by jury to say, as we show below, that that right does not occupy the same critical role in assuring fundamental fairness as do those secured in *Gault* and *Winship*. Those rights—notice of charges, assistance of counsel, cross-examination, the privilege against self-incrimination, and proof beyond a reasonable doubt—unquestionably are essential to protect against the arbitrariness that always can—though we suggest it rarely does—infect adjudications of juvenile delinquency. Those rights admittedly were accorded petitioners here, however (see Petitioners' Brief, at 15), and the importance of trial by jury must, we contend, be determined in the context of juvenile court adjudications that are now subject to all of the safeguards imposed by *Gault* and *Winship*.

Further, the Court emphasized in both *Gault* and *Winship* not only that many unique aspects of juvenile court adjudications were valuable but also that the procedural safeguards

imposed in those cases would not inhibit that value. Thus, in *Winship*, the Court pointed out that the requirement of a reasonable doubt standard would have no "effect on the informality, flexibility, or speed of the hearing at which the factfinding takes place." 397 U.S., at 366. Again, the Council has no quarrel with that judgment. To be sure, the requirements imposed in *Gault* and *Winship* have required substantial changes in juvenile court procedures in some jurisdictions, but those changes have imposed no critical inhibitions upon the goal of expeditious and flexible adjudications. This case, however, involves a vastly different requirement from the standpoint of orderly administration of the juvenile courts, as we show later in this brief.

In Re Gault, supra, is the landmark case, of course. That decision, as Dean Paulsen put it, has brought about the "constitutional domestication of the juvenile court."[5] However, on any fair reading, *Gault* must be taken as holding that the only constitutional rights required to be observed in juvenile court proceedings are those that are considered to be fundamental to the achievement of fairness to the juvenile. To be sure, concern has been expressed by some courts[6] and commentators[7] that *Gault* implied that all the constitutional protections now applicable to adults in criminal proceedings must be applied automatically and totally in juvenile court proceedings. To the Council, however, such anxiety does not appear well founded. Nothing in the language of Mr. Justice Fortas, writing for the Court in *Gault*, suggests any intention of this Court to transform the

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[5]Paulsen, *The Constitutional Domestication of the Juvenile Court*, The Supreme Court Review 233 (1967)

[6]*DeBacker v. Brainard*, 183 Neb. 461, 161 N.W.2d 508, 513 (1968), *app. dism. on other grounds*, 396 U.S. 28 (1969); *Nieves v. United States*, 280 F. Supp. 994, 1000 (S.D. N.Y., 1968).

[7]Rosenheim, *Standards for Juvenile and Family Courts: Old Wine in a New Bottle*, 1 Family L.Q. 25, 28 (1967); Wheeler and Cottrell, Juvenile Delinquency: Its Prevention and Control 33 (1966); Note, *Gault in Indiana*, 43 Ind. L.J. 661, 667 (1968).

juvenile court into another criminal court, bound by all of the adjudicatory procedures of a criminal court. To the contrary, reiterating his view in *Kent v. United States*, 385 U.S. 541, 562 (1966), Mr. Justice Fortas said in *Gault*:

> "We do not mean . . . to indicate that the hearing to be had must conform with all the requirements of a criminal trial or even of the usual administrative hearing, but we do hold that the hearing must measure up to the essentials of due process and fair treatment." 387 U.S., at 30.

Other language in *Gault* confirms the conclusion that the decision discloses no reasonable basis for the sweeping view that this Court intended to fasten on juvenile court proceedings all the procedural standards required by the Fourteenth Amendment in criminal proceedings. For example, the Court pointed out that the due process standard to be observed is to be "intelligently and not ruthlessly administered." 387 U.S., at 21. Nor did the Court suggest in *Gault* that the adversary system in full panoply was now to be required in the juvenile court. It said only that due process requirements "in contested cases will introduce *some* elements of the adversary [proceedings] . . . ." (Emphasis supplied). 387 U.S., at 27. And the Court observed that "nothing will require that the conception of the kindly juvenile judge be replaced by its opposite, . . ." *Ibid.*[8]

Indeed, with one exception, the rights which *Gault* established for juveniles charged with delinquency are the same that any litigant would enjoy, by virtue of the requirements of due process, in most types of civil proceedings and hearings before administrative agencies exercising quasi-judicial powers, as well; *i.e.*, (1) the right to adequate notice; (2) the right to confront and cross-examine witnesses; (3) the right to remain silent; and (4) the right to counsel, including the right to court-appointed counsel if the juvenile

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[8]For the same understanding of the implications in the *Gault* decision, see *Commonwealth v. Johnson*, 211 Pa. Super. 62, 234 A.2d 9, 15-16 (1967).

or his parents are indigent. It is only the last right that, as yet, has not been extensively provided for in civil and administrative hearings. Too plainly for argument, the minimum standards of fair procedure required for hearings in civil cases should also apply to hearings in a juvenile court.

It could be logically argued that constitutional decision making might be simpler if the "spacious language"[9] of the Due Process Clause of the Fourteenth Amendment were construed to embrace all of the rights contained in the Bill of Rights. However, this Court has never followed such a course of adjudication with respect to adults charged with crimes. It should not now undertake to do so with respect to juveniles similarly charged. In its most recent ruling touching upon the constitutional prerequisites that must be observed in juvenile court proceedings, it deliberately eschewed such an approach. In its decision last Term in *In Re Winship*, 397 U.S. 358 (1970), this Court held that proof beyond reasonable doubt is required by the Due Process Clause, both in criminal trials and in adjudications of juvenile delinquency, because such a requirement is among the "essentials of due process and fair treatment" to be afforded both the cirminally accused and the youth charged with delinquency.[10]

This Court's rejection, in *Gault*, of an uncritical and mechanical application of the Bill of Rights in juvenile court

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[9]*Duncan v. Louisiana*, 391 U.S. 145, 148 (1968).

[10]Unsurprisingly, this approach, even more than the result arrived at, produced a dissent by Mr. Justice Black, who for nearly a quarter of a century consistently, but unsuccessfully, has argued against pursuit of the "selective incorporation" theory of the Bill of Rights, maintaining that only the express proscriptions or implied commands of the Bill of Rights can be invoked to strike down the actions of a legislative body, federal or state. Compare Mr. Justice Black's dissenting opinion in *Winship*, 397 U.S., at 377-386, with Mr. Justice Harlan's concurring opinion in the case, 397 U.S., at 368-376.

proceedings has been approved by both critics[11] and supporters[12] of the juvenile court system. The state courts also, including the Arizona Supreme Court, whose opinion in *Gault* was reversed by this Court,[13] have espoused a similar view. The North Carolina and Pennsylvania Supreme Courts, from which this case and the *McKiever* case have come to this Court, also have adopted the same understanding of how the Bill of Rights is to be applied to juvenile court proceedings.[14] In such a view, the critical issue is what affords fairness to the juvenile, not what are the precise rights to which an adult can lay constitutional claim in criminal proceedings.[15]

The Council is of the same view that Mr. Justice Harlan first expressed in his separate opinion in *Gault* and repeated in his concurring opinion in *In Re Winship, supra, i.e.*, that "there is no automatic congruence between the procedural requirements imposed by due process in a criminal case and those imposed by due process in juvenile cases." 397 U.S., at 375. Further, the Council is of the opinion that this criterion of distinct and independent fairness to the juvenile in determining what his constitutional rights are has been developed and maintained for sound reasons. We need not accept the lazy logic of labels to recognize, as this Court did in *Gault, supra* at 22, and in *Winship, supra*, at 366-67, that criminal proceedings and juvenile court proceedings are distinguishable in ways that should be maintained. The

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[11] Dorsen and Rezneck, *In Re Gault and the Future of Juvenile Law*, 1 Family L.Q. 1, 3 (1967); Paulsen, *Fairness to the Juvenile Offender*, 41 Minn. Law Review 547, 550 (1957); Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, The Supreme Court Review 167, 186 (1966).

[12] Rosenheim, *Standards for Juvenile and Family Courts, supra;* Wheeler and Cottrell, Juvenile Delinquency, note 7, *supra.*

[13] *Application of Gault*, 99 Ariz. 181, 407 P.2d 760 (1965).

[14] 169 S.E.2d at 887; 234 A.2d at 15-16.

[15] *In Re State in Interest of Carlo*, 48 N.J. 224, 225 A.2d 110, 116 (1966); and see cases cited *In Re Gault, supra* at 12, fn. 8.

basic supporting justification for that distinction between the two is the understanding that there is a rational basis for procedural differences between juveniles charged with a violation of law and their adult counterparts. It goes without saying that juveniles are of an age when the enticements of crime are most alluring, yet when their sense of right and wrong is at its peak and when their susceptibility to reform is the greatest.

Nor has this Court been oblivious to the fact that a child's immaturity may serve as a basis, if necessary for his protection, for the state not to afford him the same scope or quantum of constitutional freedom that an adult otherwise might enjoy. As Mr. Justice Frankfurter once put it:

> "Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to a determination of a state's duty towards children."[16]

For example, the Court has sanctioned restriction by the legislature of a child's free exercise of religion rights, *Prince v. Massachusetts*, 321 U.S. 158, 170 (1943), and his rights to free speech, *Ginsberg v. New York*, 390 U.S. 629, 638 (1968), when reasonably necessary for the protection of his own unavoidable condition of immaturity. Do a child's Due Process rights occupy a higher plane than his First Amendment freedoms?

To be sure, some critics of juvenile court procedure have argued that: "Juveniles have an intense perception of fairness; and children are familiar nowadays from an earlier age with fair trial notions of jury trial and reasonable doubt;" and, therefore, to "deny them this right will work against their rehabilitation which can only be built upon their belief that they have been treated fairly."[17] Mr. Justice Fortas apparently paid some heed to this notion in his opinion in

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[16] *May v. Anderson*, 345 U.S. 528 at 536 (1953).

[17] *Crime in the National Capital*, Hearings on S. 2981 Before the Committee on the District of Columbia, United States Senate, 91st Cong., 1st Sess. (1969), p. 1866.

Gault. See 387 U.S., at 26. On the other hand, the sociological and psychological findings which hold to the contrary are those which, in part, gave birth to, and still justify, the less formalistic procedural functioning of the juvenile court. That court system, as it has evolved, has been characterized by Dean Francis Allen as "the most important and ambitious effort yet undertaken by our law to give practical expression to the rehabilitative ideal."[18]

Moreover, more recent scientific findings in the field of ethology tend to confirm that the sociologists, lawyers and other reformers of the early 19th century who conceived and created the juvenile court system were on the right track in separating the juvenile from his adult criminal counterpart. The leading writers in this relatively new scientific field agree that one of the greatest mistakes in child rearing may have been the assumption that aggression, including unsocial behavior, on the part of a child is only a response to frsutration and that a child must be indulged-indeed treated as a little adult-for his own ultimate sound development. Lorenz, On Aggression 47 (1969); Storr, Human Aggression 44 (1968); Morris, The Naked Ape 126-28 (1967); Ardrey, The Territorial Imperative 20-21 (1966). The recent works of these writers have seriously discredited the behavioristic-environmentalistic theories of the nature of man, including the rearing of the young, that have been in vogue for half a century. They would surely find amusing but unfounded the notion that, unless society and the law provide a juvenile with identical procedural treatment to that afforded an adult, he might be permanently marred, so far as his future social adjustment as a human being is concerned.

The applicability of a particular constitutional right in the juvenile court, when invoked under the mandate of due process, should be tested by its relevance to the standard of fairness to the juvenile within the total context of the juvenile court's quest for the rehabilitative ideal. Judged in

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[18] Allen, The Borderland of Criminal Justice 48 (1964).

that light, *amicus* contends, for the reasons now stated, that the right to trial by jury is not so fundamental to a system of ordered liberty that it must be observed in a juvenile court proceeding.

B. *Due Process Does Not Require a Jury Trial for a Juvenile Charged with Delinquency.* The critical issue in determining whether due process requires the application of the Sixth Amendment's right to a jury trial in juvenile court proceedings is whether that right is so fundamental that a proceeding conducted in its absence must be said to be intrinsically unfair. To this the petitioners offer a syllogistic, but unpersuasive, answer. First, they point out that this Court's decisions in *Duncan v. Louisiana* and *Bloom v. Illinois, supra*, establish that the Sixth Amendment, as made applicable to the States by the Fourteenth Amendment, requires a jury trial in any serious criminal case, subsequently found by the Court to be any case where the maximum penalty to which the defendant might be exposed is in excess of imprisonment for six months. *Baldwin v. New York*, 38 U.S. Law Week 4554, June 22, 1970. Accordingly, petitioners say, since the offenses on which the adjudication of delinquency was based in both this case and *McKiever* would expose the juveniles to possible confinement for a period in excess of six months, they necessarily had a constitutional right to a jury trial before they could be adjudicated delinquents. Further, the petitioners argue, the Court's even more recent decision in *In Re Winship, supra*, holding the reasonable doubt standard of proof to be required by due process both in criminal proceedings and in juvenile court proceedings, also supports the claim of a jury trial right which they assert in this litigation.

Amicus turns to these cases. It is perhaps *Duncan* that is most critical. There, Mr. Justice White, writing for the Court, spoke not of fundamental fairness in the abstract but of such fairness according to the meaning "the American scheme of justice" concretely ascribes to it. The Court there granted that "[a] criminal process which was fair and

equitable but used no juries is easy to imagine," but continued that "no American State has undertaken to construct such a system." 391 U.S., at 150, n. 14. At a later point in the opinion, the Court again emphasized that the "strong support" which the jury trial right in criminal causes had received in the laws of every state was very pertinent in determining whether it was fundamental in the American system of justice. *Id.*, at 154.[19]

The same constitutional approach was followed by Mr. Justice Brennan, writing for the Court in *In Re Winship*, *supra*, in concluding that the Due Process Clause requires proof beyond a reasonable doubt both in criminal trials and at the adjudicatory stage of a juvenile court proceeding when a juvenile is charged with an act that would constitute a serious crime if committed by an adult. In reaching that conclusion, the Court first considered history, noting that the "requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation." Next, it noted the "virtually unanimous adherence to the reasonable doubt standard in common law jurisdictions", observing that while that adherence "may not conclusively establish it as a requirement of due process, such adherence does 'reflect the profound judgment about the way in which the law should be enforced and justice administered' [citing *Duncan v. Louisiana* at 155]". The Court's opinion in *Winship* then reviewed the "many opinions of this Court [which] indicate that it has been assumed that proof of a criminal charge

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[19] As he did in *Gault*, and again in *Winship*, Mr. Justice Black, while concurring in the result reached in *Duncan v. Louisiana*, was careful to preserve his opposition to the selective incorporation theory on which the Court proceeded and on which the majority opinion rested in *Duncan*. However, he did concede that the selective incorporation doctrine "does limit the Supreme Court in the Fourteenth Amendment field to specific Bill of Rights protections only and keeps judges from roaming at will in their notions of what policies outside the Bill of Rights are desirable and what are not." 391 U.S., at 145.

beyond a reasonable doubt is constitutionally required." 397 U.S., at 362. Next, it referred to the vital role which the reasonable doubt standard plays "in the American scheme of criminal procedure . . . where it is a prime instrument for reducing the risks of convictions resting on factual error . . . [and] in truth is the standard [which] provides concrete substance for the presumption of innocence", that bedrock principle which lies at the foundation of the administration of American criminal law. 397 U.S., at 358. Going on to find that the "same considerations that demand extreme caution in fact finding to protect the innocent adult apply as well to the innocent child", 397 U.S., at 365, the Court then held that the same standard of proof must be observed in the juvenile court as in the adult criminal court. However, it was careful to discount that the imposition of the reasonable doubt standard in juvenile proceedings would have "any effect on the informality, flexibility, or speed of the hearing at which the fact finding takes place." 397 U.S., at 366.[20]

The Council does not disagree with either the results or the rationale on which those results were reached in *Duncan* and in *Winship*. However, it is clear from both of those decisions, and before, that due process must take into account the practices found suitable by the deliberate process of legislative and judicial action throughout the States. On that analysis, the juvenile court, as now conducted in more than two-thirds of the States, cannot be found wanting in due process by proceeding without a jury trial.

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[20]In his concurring opinion, Mr. Justice Harlan emphasized his view that the requirement of proof beyond a reasonable doubt "does not (1) interfere with the worthy goal of rehabilitating the juvenile, (2) make any significant difference in the extent to which a youth is stigmatized as a 'criminal' because he has been found to be a delinquent, or (3) burden the juvenile courts with a procedural requirement that will make juvenile adjudications significantly more time consuming or rigid. Today's decision simply requires a juvenile judge to be more confident in his belief that the youth did the act with which he has been charged." 397 U.S., at 375.

From the inception of the juvenile court systems in the States, provision for a jury trial right in the juvenile court statute, either expressly or impliedly, has been rare, and use of that right, where provided, has been even more unusual, at least prior to *Gault*. A study of the statutes and judicial opinions indicates that 34 states at present clearly and definitively deny the juvenile a right to a jury trial in cases such as this.[21] Some 12 other jurisdictions (including, until recently, the District of Columbia) grant that right, but then only upon demand. Senate Hearings, note 17, *supra* at 1835.[22] Of the remaining five states, it is very probable

[21] By statute in: Ala. Code Tit. 13, Sec. 369 (1969); Alaska Stat. 47.10.070 (1968 Supp.); Ariz. Rev. Stat. Ann., Sec. 8-229 (1956); Ark. Stat. Ann., Sec. 45-206 (1964 Repl.); Del. Code Ann. Tit. 10, Sec. 1175 (1966 Supp.); Fla. Stat. Ann. 39.09(2) (1961); Ga. Code Ann., Sec. 24-2420 (1959); Hawaii Rev. Stat., Sec. 571-41; Gen. Laws Idaho Ann., Sec. 16-1813; Ind. Ann. Stat., Sec. 9-3215 (1967 Burns' Supp.); Iowa Code Ann. 232.27 (1969 Supp.); Ky. Rev. Stat., Sec. 208.060 (1962); La. Rev. Stat. Ann., Sec. 13:1579 (1968); Minn. Stat. Ann., Sec. 260.155(1) (1967 Supp.); Miss. Code Ann., Sec. 7185-08 (1942); Vernon's Ann. Mo. Stat., Sec. 211.171(6) (equity practice controls); Neb. Rev. Stat., Sec. 43-206.03(2) (1943); Nev. Rev. Stat., Sec. 62.190(3) (1963); N.J. Stat. Ann. 2A:4-35 (1963); McKinney's Consol. Laws N.Y., Family Court Act 164, 165 and Civ. Prac. Law and Rules 4101; N.D. Century Code, Sec. 27-16-18 (1967 Supp.); Page's Ohio Rev. Code Ann., Sec. 2151.35 (1968 Repl.); Ore. Rev. Stat., Sec. 419.498(1) (1967 Supp.); Purdon's Pa. Stat. Ann., Tit. 11, Sec. 247 (1954); Code S.C. Laws, Sec. 15.1095.19 (1968 Supp.); Utah Code Ann., Sec. 55-10-94 (1967 Supp.); Vt. Stat. Ann., Tit. 33, Sec. 651(a) (1968 Supp.); Rev. Code Wash. Ann., Sec. 13.04.030.

By judicial decisions in: Calif.: *In Re Daedler*, 194 Cal. 320, 228 P. 467 (1924); Conn.: *Cinque v. Boyd*, 99 Conn. 70, 121 A. 678 (1923); Md.: *In Re Fletcher*, 251 Md. 520, 248 A.2d 364 (1968); Mass.: *Comm. v. Page*, 339 Mass. 313, 316, 159 N.E.2d 82, 85 (1959) (*dictum*); *Marsden v. Comm.*, 352 Mass. 564, 227 N.E.2d 1, 2 (1967) (*dictum*); N.C.: *In Re Watson*, 157 N.C. 340, 72 S.E. 1049 (1911); *State v. Burnett*, 179 N.C. 735, 102 S.E. 711 (1920); N.H.: *In Re Perham*, 104 N.H. 276, 184 A.2d 449 (1962).

[22] By statute in: Colo. Rev. Stat. Ann. 22-8(1); Kan. Stat. Ann. 38-808 (1968 Supp.) but here the Juvenile Court merely refers the issues to another tribunal for a jury trial and then it is returned for

that four would not grant a jury trial if the question were directly raised for decision.[23] Admittedly, the customs and usages of even a substantial number of States should not be of controlling weight when great constitutional rights are at stake. Nevertheless, they are extremely relevant to determination of the instant issue. As Mr. Justice Clark once said,

> "The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' "[24]

Thus, so far as state practices are concerned, and unlike the situation in *Duncan v. Louisiana* and in *In Re Winship, supra*, the existence of a jury trial right in juvenile court proceedings has received limited acceptance only in a dis-

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disposition to the Juvenile Court; Mich. Stat. Ann., Sec. 27.3178 (598.17); Rev. Codes Mont., Sec. 10-603 (1947); Okla. Stat. Ann., Tit. 10, Sec. 1110; S.D. Code (1939), Sec. 43.0331 (but only the court may order a jury of six); Vernon's Ann. Rev. Tex. Stat., Art. 2338-1, Sec. 13(b); W.Va. Code Ann., Sec. 49-5-6; Wis. Stat. Ann., Sec. 48.25(2) (1957); Wyo. Stat. Ann., Sec. 14-108(c) (1961); 16 D.C. Code 2307 (1967).

By judicial decision in: *Peyton v. Nord*, 78 N.M. 717, 437 P.2d 716 (1968).

[23]In Virginia, *amicus* is advised that the current practice opposes a jury trial. See, in general, Code Va. Ann., Sec. 16.1-162 (1950). In Maine, the statute stipulates an informal juvenile court hearing. Me. Rev. Stat. Ann., Sec. 15-2610. In Illinois, the earliest act provided for a jury but the latest revision makes no mention of the matter. In Tennessee the earlier right to a jury trial statute was repealed in 1955 and its replacement does not mention the issue. In Tennessee the earlier right to a jury trial statute was repealed in 1955 and its replacement does not mention the right. Tenn. Code Ann., Sec. 37-244. Finally, in Rhode Island, the most recent statutory amendment has replaced the direct prohibition of a jury with silence. Gen. Laws R.I., Sec. 14-1-30 (1967 Supp.).

[24]*Leland v. Oregon*, 343 U.S. 790, 798 (1952).

tinct minority of the States. And the District of Columbia, whose statute formerly provided for it,[25] has seen the recent repeal of the right through the action of the Congress in enacting the District of Columbia Crime Bill, P. L. No. 91-358, 91st Cong., 2d Sess., approved July 29, 1970.[26]

The right to a jury trial in juvenile courts has been denied both by legislative action and by appellate decisions in cases contesting the legislative mandate.[27] Moreover, the opinions of the scholars, with only a rarely encountered dissent,[28] oppose the incorporation of the jury trial into juvenile court proceedings.[29] The Standard Juvenile Court Act[30] and the Uniform Act[31] do not provide for it. The recent Minnesota Juvenile Court Rules have not adopted it.[32] Nor was it viewed with approbation by the Task Force Report on Juvenile Delinquency and Youth Crime of the President's Commission on Law Enforcement and the Administration of Justice.[33] Similarly, the recent guidelines

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[25] 16 D.C. Code 2307 (1967).

[26] *Washington Post*, July 30, 1970, p. A-1.

[27] See, *e.g.*, *Estes v. Hopp*, 73 Wash.2d 272, 438 P.2d 205 (1968); *Comm. v. Johnson*, 211 Pa. Super. 62, 237 A.2d 9 (1967). *Contra*: *Peyton v. Nord*, 78 N.M. 717, 437 P.2d 716 (1968).

[28] Antieau, *Constitutional Rights in Juvenile Courts*, 46 Cornell L.Q. 387, 400-01 (1961). But Professor Antieau bases his judgment, in part, on an erroneous finding that "the legislatures in almost half the states" provide for a jury trial in juvenile court matters; Dorsen and Rezneck, supra at 22-23. Note, *Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal*, 114 U. Pa. L. Rev. 1171, 1187 (1966).

[29] Tappan, Juvenile Delinquency 211-12 (1949); Sheridan, Standards for Juvenile and Family Courts 73 (1966).

[30] Section 19 (6th Ed. 1959).

[31] Uniform Juvenile Court Act, Section 24(a) (Nat'l. Conf. Comm. on Uniform State Laws, 1968).

[32] Minn. Juvenile Court Rules, Minn. Stat. Ann. Supp. 1969, foll. Chap. 260 (1969).

[33] P. 38.

promulgated by the United States Department of Health, Education and Welfare reject the requirement of a jury trial as both unnecessary and undesirable.[34] The Council believes it worthy of note that both the sponsors of the Uniform Act and HEW, while opposing a jury trial right for a juvenile, did urge the adoption of the reasonable doubt standard prior to the Court's decision in *Winship*. 397 U.S., at 361, n. 3.

Even the 11 remaining jurisdictions which permit a jury trial in juvenile matters make no convincing case that fundamental fairness requires a jury trial in the juvenile court. An example provided by the Harvard Law Review note, which the majority opinion in *Gault* cited with some frequency, is the Denver experience. There, only two requests for jury trials were made during a 25 year period and both requests were withdrawn before the trial.[35] It is only fair to note, however, that the number of demands for jury trials increased perceptibly, at least in the District of Columbia, following this Court's decision in *Gault*, which, for the first time, guaranteed a juvenile the right to be represented by counsel either engaged by his parents or appointed by the court in the event they were indigent. In the District of Columbia three jury trials were held between 1964 and 1966, 11 jury trials in 1967 and 32 in 1968.[36] However, at the hearings on the District of Columbia Crime Bill, the Department of Justice reported that at "the end of fiscal 1969 there were 290 juvenile court cases awaiting jury trial in the D. C. Juvenile Court."[37] The change in statistics furnishes

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[34] Sheridan, Standards for Juvenile and Family Courts, U.S. Dept. of Health, Education and Welfare 73 (1966); see also Senate Hearings, note 17, *supra* at 1835-36.

[35] Note, *Juvenile Delinquents: The Police, State Courts and Individualized Justice*, 79 Harv. L. R. 775, 794 (1966).

[36] Annual Report of the Juvenile Court of the District of Columbia, Fiscal Year 1968, p. 9.

[37] Senate Hearings, note 17, *supra* at 1804.

no argument in support of the proposition that fundamental fairness requires a jury trial. Yet it does suggest, however, that if the jury trial right is fastened on the juvenile court system, lawyers will not hesitate to invoke it with ever-increasing frequency.[38]

There is, then, no case which can be made for requiring the jury trial in juvenile court proceedings on the basis either of tradition or of its widespread use in the juvenile court systems of the various States. Likewise, the proposition cannot be bolstered—in contrast to the case for the use of the reasonable doubt standard—by any argument that it is required as "a prime instrument for reducing the risk of convictions resting on fundamental error" and preserving "the presumption of innocence." *In Re Winship, supra* at 363. Indeed, as a result of the *Winship* case, juvenile court judges now must apply the reasonable doubt standard in any adjudication of delinquency in the future. The injection of a jury trial requirement would neither make nor mar that duty of the juvenile court judge. It was partially for that very reason that the Congress repealed the jury trial requirement for the District of Columbia. As the Senate report stated:

> "The Senate District Committee has concluded, again, that, inasmuch as the bill as reported provides a sufficiently high standard of proof for fact-finding, the option of trial to a jury is both unnecessary and ill-advised. It is readily apparent that trial to a jury is the least expeditious means of fact-

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[38] Also illustrative of the impact of the *Gault* requirement that lawyers must be provided in juvenile court cases is the report which the National Council on Crime and Delinquency has received from the Juvenile Court in Denver where, as noted supra, p. 25, jury trials formerly were very rarely requested, but where in the first four months of 1970 requests for jury trials were made in 54 of 58 pending delinquency petitions. Letter from Judge Ted Rubin, Judge, Juvenile Court, Denver, Colorado, to the Associate Counsel, National Council on Crime and Delinquency, May 12, 1970.

finding. At the same time, the therapeutic need for expedition is especially great in a system devoted to impressionable juveniles; and expedition is indeed especially important in a system purported oriented in its entirety to therapy or treatment."[39]

Moreover, whatever its failures have been, the juvenile court system was in the beginning and remains now a unique system of individualized justice whose purpose "is remedial and to a degree preventive rather than punitive."[40] Putting all labels aside, the juvenile court system, like American administrative law, is something different from what existed before. Its origins are not on the criminal side; nor can its proceedings be characterized merely as "civil". And while the founders of the juvenile court may have found precedents for what they created in chancery cases, juvenile courts were not derived from the English Courts of Chancery.[41] They were and remain special statutory courts having jurisdiction over certain causes and as such have their own procedure adapted to the type of case heard.[42] Thus, the juvenile court system, like administrative law, is *sui generis*, finding analogies for the procedures it observes in other areas of the law, but maintaining its own unique nature specially fashioned in order to achieve the particular purposes for which it was created. Could it be seriously maintained, for example, that the failures or injustices occurring in the fact-finding procedures of federal and state administrative tribunals exercising important quasi-judicial powers justify imposing upon them the traditional factfinding prerequisites of the common law system? It is no more persuasive to urge that failures of the juvenile court system, due mainly to the lack of public and private resolve in providing the support

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[39]Senate Report No. 91-620, 91st Cong., 1st Sess., December 18, 1969, p. 13.

[40]Standards for Juvenile and Family Courts, *supra*, 1 (1966).

[41]Pound, Interpretations of Legal History 135 (1923).

[42]Note 40, *supra* at 71.

and in approving the funds necessary to implement that resolve, require constitutional changes in the factfinding prerequisites to be observed in that court.

Finally, before transferring the jury system *in toto* to the juvenile court, some consideration should be given to the relative merits of jurors, as opposed to judges, as instruments of fair and effective factfinding. Rhetoric aside,[43] it is still possible to define the concrete bases asserted to justify the existence of the jury trial as an essential component of the American system of justice. It is said to be effective as a factfinding mechanism.[44] However, the recent University of Chicago jury trial study shows that judges and juries agree on the proper disposition of criminal cases in 75.4% of the cases studied.[45] This pattern of agreement is strong evidence that juries are not significantly better equipped to find the facts than judges are. The same point has been made by some state courts in rejecting the constitutional necessity for a jury trial in juvenile courts.[46]

It has also been argued that the right to a jury trial "was clearly intended to protect the accused from oppression by the Government. . . ."[47] Yet past intentions should be read in the light of current realities. Or as Mr. Chief Justice Burger has said:

> ". . . a government bent on destroying individual liberties can do it with a jury or with a non-jury inquiry system. You can juggle any system if you've got enough power in the establishment to do it."[48]

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[43]For one of the stronger criticisms of our traditional jury system, see Frank, Courts on Trial 32 (1949).

[44]Dorsen and Rezneck, *supra* at 23.

[45]Kalven and Zeisel, The American Jury 56 (1966).

[46]*Dryden v. Comm.*, 4 Cr. L. Rep. 2253 (Ky. Ct. App., 1968).

[47]*Singer v. United States*, 380 U.S. 24, 31 (1965); *Duncan v. Louisiana, supra* at 155.

[48]1 The Center Magazine 7, November 1968.

Juries have, it has been said, a virtue in that they may "afford a higher justice by refusing to enforce harsh laws. . . ."[49] Still, the jury that is flexible or non-rule minded enough, or not sufficiently cognizant of its oath, to acquit in one case may in a later case convict on whimsy, too.[50]

Then again, juries are said to be a buffer against the "overworked judge"[51] who will give a case the assembly line treatment, or "as a protection against jaded judges who hear case after case, day in and day out and decide on past prejudices rather than present evidence."[52] Such generalities are more epigrammatic than informative. Whereas some juvenile judges are bound to be insensitive, others are equally certain to be compassionate and experienced. The experience of trying cases is not always a debilitating influence upon good and conscientious judges. It may also awaken in them responses and sympathies which no amount of theorizing would loose. In any event, any seasoned trial attorney knows that juries quickly become jaded, too. Witness, for example, the jockeying with the criminal trial calendar on the part of defense counsel in order to avoid the adverse impact of a trial before a jury soured by one month's experience in court. Or as Kalven and Zeisel have put it,

> "Somehow the combination of official role, tradition, discipline, and repeated experience with the task make of the judge one kind of decider. The perennial amateur, layman jury cannot be so quickly domesticated to official role and tradition; it remains accessible to stimuli which the judge will exclude."[53]

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[49]*Duncan v. Louisiana, supra* at 187 (Harlan, J. and Stewart, J. dissenting).

[50]Kalven and Zeisel, *supra* at 9.

[51]Dorsen and Rezneck, *supra* at 23.

[52]*Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal, supra* at 1187.

[53]Kalven and Zeisel, note 45, *supra* at 498.

In recognition of this sometimes heated and almost never empirically valid debate, where hyperbole abounds, over the merits of the jury system, it would be anomalous to import the jury trial wholesale into the juvenile court on the theory that it is so fundamental to our way of justice as to be imperative in the juvenile court as elsewhere. Whatever the stature of the jury trial in criminal causes, this *amicus* maintains that its desirability in other proceedings is sufficiently debatable to preclude accepting its status as a fundamental necessity required by due process in juvenile court proceedings.

C. *Imposition of a Jury Trial Requirement Would Carry Adverse Practical Consequences for the Efficient Operation of the Juvenile Court System.* As argued, neither fundamental fairness, any continuing national tradition nor universal practices observed in the States can be summoned to support the existence of a constitutional right to a jury trial in the juvenile court. Beyond these pertinent considerations, however, the practical consequences that would ensue if such a jury trial is to be required furnish an additional strong deterrent to requiring such a drastic change in the proceedings of the Nation's juvenile courts.

First, if the jury trial is injected into the juvenile court system as a matter of right, along with it unfortunately will come the traditional delay, formality and inevitable "clash and clamor"[54] of adversary proceedings with which adult jury trials are so frequently permeated. The Congress very recently indicated its awareness of these unfortunate accouterments of a jury trial imposed on juvenile court proceedings when it eliminated the "cumbersome and *inappropriate* trial by jury" formerly required by statute in the District of Columbia. (Emphasis supplied).[55] Noting the

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[54] *Dryden v. Comm.*, note 46, *supra.*

[55] Senate Report No. 91-620, note 39, *supra* at 1.

"delay in juvenile proceedings [which] operates to the detriment both of the community and of the child", the Senate District Committee recommended, and the Congress approved, abolition of the jury trial in the District of Columbia Juvenile Court as the backlog of jury cases in that court edged past the 300 mark.[56] The Senate conferees on the District Crime Bill, reporting back to the Senate after the Conference Committee had reached agreement in recommending approval of the legislation, made the practical argument against the juvenile jury trial in strong terms, saying:

> "Pursuant to the conference report on S. 2601, jury trials are no longer to be allowed in juvenile proceedings; however, the standard of proof for purposes of factfinding in delinquency proceedings is raised from by a preponderance of the evidence to beyond a reasonable doubt. In the view of the conferees, the reasonable doubt standard renders jury trial unnecessary as protection against judicial predisposition. Equally important, again in the view of the conferees, the jury has no function to exercise as a buffer of broad community judgment between the accused and some prescribed statutory punishment (that is, a specific range of penalties), since under the juvenile code there are no prescribed punishments, as such; disposition, treatment, in juvenile proceedings uniquely lies, and in theory is intended to lie, within the sole discretion of the judge. In the view of the conferees, any benefit lost in the elimination of jury trials is more than offset by the gain in expedition essential in juvenile cases. It is the case, furthermore, that jury trials may prove unnecessarily traumatic for the immature persons, children, in the juvenile system. Also, a peculiar need for expertise in factfinding may arise in juvenile proceedings as the testimony of juvenile parties and wit-

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[56] *Ibid.* at p. 6; Senate Hearings, note 17, *supra* at 1804.

nesses must be assessed from the often unusual juvenile perspective.[57]

Indeed, both friends and foes of proposals to cut back some of the procedural protections enjoyed by the criminally accused agree on one point—that is, the extended delays which now occur between a criminal charge and the final disposition of that charge, at least in a great majority of the larger urban jurisdictions of the Country, are an abomination, unfair to many defendants and frequently gravely harmful to the peace and security of law-abiding citizens. Beyond dispute, the jury trial requirement is a partial, but substantial, contributing factor to such delay. Do we really wish to import the jury trial and its propensity for invidious delay into the juvenile court system, a system which, if it is to work at all, must set in motion at the earliest possible moment whatever special facilities and techniques it may have for the counselling, treatment, rehabilitation and reform of a troubled child?

The Council believes that the answer to the not-so-rhetorical question posed immediately above is obvious. Others, however, purport to read a contrary message in this Court's opinions in *Gault and Winship, supra,* where procedural rights required in adult criminal proceedings were held to be constitutional prerequisites for juvenile court adjudications. The *amicus* will not repeat the analysis of those two decisions which it made earlier in this brief. It is sufficient to say that as to *Gault* the minimal procedural rights which the Court required in that decision are basic and fundamental, not only in criminal, but also in a great majority of civil and administrative, proceedings. Indeed, they are the *sine qua non* of any fair adversarial hearing within the meaning of the Anglo-Saxon tradition. But the procedural evils at the cure of which *Gault* was directed are not affected by substituting a jury of laymen for an experienced juvenile

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[57] Statement of the Managers on the Part of the Senate Regarding Conference Action on S. 2601, Committee Print, 91st Cong., 2d Sess., July 15, 1970, p. 19.

court judge. This is especially true now that this Court has determined that the factfinder in a juvenile court proceeding must apply the reasonable doubt standard rather than the preponderance of evidence standard of proof.

Nor, as we have attempted to show, does the Court's decision in *Winship, supra,* argue in favor of the result sought by the petitioners here and the appellants in *McKiever.* As previously stated, Mr. Justice Brennan, speaking for the Court in *Winship,* was careful to point out that the reasonable doubt standard would not have "any effect on the informality, flexibility or speed of the hearing at which the factfinding takes place." 397 U.S. at 366. We suggest that no one rationally can make that statement with respect to the imposition of the jury trial requirement in juvenile court proceedings.

Apart from the delay factor which, by itself, should deter the Court from requiring a jury trial in juvenile court proceedings, there are other significant practical considerations which argue against its imposition. For one, a jury trial in the juvenile court, by replacing the judge as the finder of fact, will require substantial alteration of the traditional practice observed in that court. As he becomes of necessity a referee in a contest between the state and one of its juvenile citizens, and deprived of the power of being the final arbiter of fact, the juvenile court judge will have to concern himself much more with the technicalities of procedure, with the consequently reduced capacity to guide and mold the hearings. Hearsay evidence, for example, now admissible in judge-conducted delinquency adjudications would probably have to be excluded where a jury sits in judgment in the juvenile court.

Secondly, there is the matter of the "public trial" required by the Sixth Amendment to the Constitution of the United States. Even today, among those 11 States which provide opportunity for a jury trial in juvenile court, only four permit open or public hearings, and even in these four there are provisions for closing the hearing when felt neces-

sary in the discretion of the court. Senate Hearings, note 17, *supra* at 1835. The Council has grave doubts that anyone in this day of the widest possible news coverage by the communications media can point to any salutary effects—either from the point of view of the juvenile or from that of society—to be achieved by making adjudications of juvenile deliquency public proceedings. Nor is it any answer to the obvious to say that the juvenile can waive his right to a public trial. The very facts of the case at bar show what little control the juvenile has over protecting his privacy when other forces, including less than reticent counsel, are inclined in the other direction. If a juvenile court delinquency hearing is to be made a public matter, this Court truly will have supervised the complete conversion of the juvenile court into a court which, so far as its disposition procedures are concerned, is exactly identical to its adult criminal court counterpart. That result would, in the judgment of the Council, be deplorable.

Then, there is the further concern that the right to a jury trial does not travel without its necessary impedimenta.[58] These may have a constitutional dimension, if the right to jury trial does so. For example, will the jury verdict have to be a unanimous verdict, as suggested by the appellant in *DeStefano v. Woods*, 392 U.S. 631 (1968)? How representative must the jury be? In point of fact can it be representative, since by law in most jurisdictions persons under 21 cannot serve on juries? *Amicus* mentions these troublesome peripheral issues only to emphasize that any declaration that there is a constitutional right to a jury trial in juvenile court proceedings inevitably will introduce other troublesome questions which will put the juvenile court to the test as much as they will this Court.

Finally, there is the necessary formality that inevitably accompanies a jury trial. It may be that the informality of

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[58] *Bloom v. Illinois*, 391 U.S. 195, 213 (1968) (Fortas, J. concurring).

the juvenile court is not an unmixed blessing,[59] but it does have certain positive advantages for the juvenile. It frustrates the urge of the youth for notoriety and attention.[60] It removes some portion of the stigma of criminality,[61] and it softens the impact of charge, trial and disposition upon an impressionable youth.

There may be some doubt, resulting from an empirical void, as to the exact nature of the rapport between judge and juvenile, as to the extent to which a jury trial may have a traumatic effect of any substantial duration upon the juvenile. Yet, it is reasonably clear that "tearing the 'socialized' procedure out of our [juvenile court] system is not a great leap forward . . ."[62] for the juvenile. "For children who are receiving the 'worst' of both worlds, it is no great achievement to brighten the one that may not matter as much to them."[63]

Finally, the juvenile court is not the only quasi-criminal tribunal with the power to institutionalize persons without engaging in a trial by jury. Sex psychopath laws often have the same effect. Mental commitment procedures are well-known and frequently used illustrations of such authority to cause loss of liberty. Even in criminal proceedings, there might well be pre-trial hearings on an issue of the accused's competency to stand trial with a resulting long-term deprivation of liberty. And in the juvenile court, in dependency cases a similar consequence often follows from a jury-less proceeding. A decision in this case requiring a jury trial in

[59]Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 Wis. L. Rev. 7, 19; Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 Colum. L. Rev. 281, 284 (1967).

[60]Tappan, Juvenile Delinquency, *supra* at 146.

[61]Rubin, Crime and Juvenile Delinquency 66 (1958).

[62]Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, The Supreme Court Review 167, 192 (1966).

[63]Handler, *The Juvenile Court and the Adversary System*, note 59, *supra* at 32.

the juvenile court could have a domino-like effect upon other proceedings which entail confinement and loss of liberty. Such possible consequences should not be discounted in arriving at a conclusion on the merits of the jury trial issue posed in this case.

For all these reasons, the Council urges that the Court not find that due process of law requires the imposition of a jury trial right in juvenile court adjudications of delinquency. However, the Council would like to point out that it is not opposed to state statutes which permit a jury trial in the discretion of the court. Such provisions permit the holding of a jury trial in a serious case where unavoidable prehearing press reports have directed public attention to the case and where the juvenile protests his innocence of the grave act with which he is charged. This, however, is the comparatively rare situation and can be accommodated by statutory provision without imposing the jury trial as a constitutional prerequisite in the other 99% of juvenile court cases.

II.

EQUAL PROTECTION OF THE LAWS IS NOT OFFENDED BY DENYING A JURY TRIAL TO A JUVENILE

The record in this case, as well as that in *McKiever*, does not indicate that the juvenile petitioners expressly asserted in the courts below any constitutional claim that denying them a jury trial constituted a violation of the Equal Protection Clause of the Fourteenth Amendment. Still, the issue is not completely free from doubt. In the prior case of *DeBacker v. Brainard, supra*, which the Court heard in its 1969 Term, several of the Justices inquired of counsel concerning possible equal protection implications if a jury trial is denied a juvenile in a proceeding in which he is charged with delinquency. Accordingly, the *amicus* believes that the equal protection question, whether formally preserved for decision in this litigation or in *McKiever*, merits at least some brief attention.

Respondent North Carolina has cited illustrative instances in which the law does not treat children on an equal footing with adults. Children, the respondent notes, are required to obey their parents, are not allowed to vote, are not allowed to drive automobiles, cannot bind themselves by contract, are not allowed to sit on juries and are required to attend school. All these distinctions in the treatment of children in the law are long established and well accepted. Of course, it might be said that such distinctions are either for the protection of the child or are imposed out of an awareness that the immaturity of youth precludes, at least in the great majority of cases, possession of the necessary wisdom, discretion or maturity of judgment required to permit the juvenile to exercise particular privileges enjoyed by adults, such as, for example, the right to vote or the right to sit on juries. Still, in all these situations it is the condition of being a child and the presumption of immaturity which attaches to that condition which both explains and justifies the difference in the law's treatment of the juvenile as opposed to the adult.[64]

Nevertheless, it might fairly be asked, is that condition a convincing basis for denying a juvenile the alleged protections of a jury trial—a right which an adult enjoys and a right, it might be maintained, which is for the juvenile's protection and the exercise of which is not beyond his wisdom or judgment to invoke intelligently?

There are several answers to the assertion of such an equal protection claim for a juvenile's jury trial right. In part, they are the same answers which the *amicus* has given to the question of whether due process requires affording the juvenile a jury trial right, *viz:* (1) the jury trial right, at least in the overwhelming run of cases, will not confer any significant benefit, but may work some substantial disadvantage, to the juvenile; (2) the entire juvenile court system, including the majority of juveniles who are confronted with charges of

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[64]Young, *The Constitution and the Juvenile Court—Letter or Spirit*, 44 Jour. of the Am. Jud. Soc. 94, 97 (1960).

delinquency, would be adversely affected by the substantial delay introduced into that system if a jury trial is to be required; and (3) even the most fundamental of constitutional rights, including the right to free speech and the free exercise of religion, no less than the right to a jury trial, may be restricted when necessary for the long run protection of children, whatever short-run advantage may be thought to be provided in a particular case by the full grant of such rights to the juvenile.

Thus, in essence, the same reasons which justify the conclusion that denial of a jury trial in a juvenile court proceeding does not deserve censure under the Due Process Clause also serve to prevent its condemnation as a violation of the Equal Protection Clause. At the root of both conclusions is the ancient assumption, overwhelmingly supported by the teachings of psychology, biology, physiology, sociology and ordinary human experience, that a child is not the same as an adult. Therefore, treating him as a child and not as an adult is not unconstitutional, provided that he is treated fairly. Denying him a jury trial is not treating him unfairly, and the difference in such treatment is not one condemned by the Constitution of the United States.

CONCLUSION

For the reasons stated in this brief, the *amicus* urges the Court to affirm the decision of the North Carolina Supreme Court in this case and that of the Pennsylvania Supreme

Court on appeal in *McKiever v. Commonwealth of Pennsylvania*, No. 322.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1970

No. 149

IN RE BARBARA BURRUS, et al.,

Petitioners

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE STATE OF NORTH CAROLINA

Respondent.

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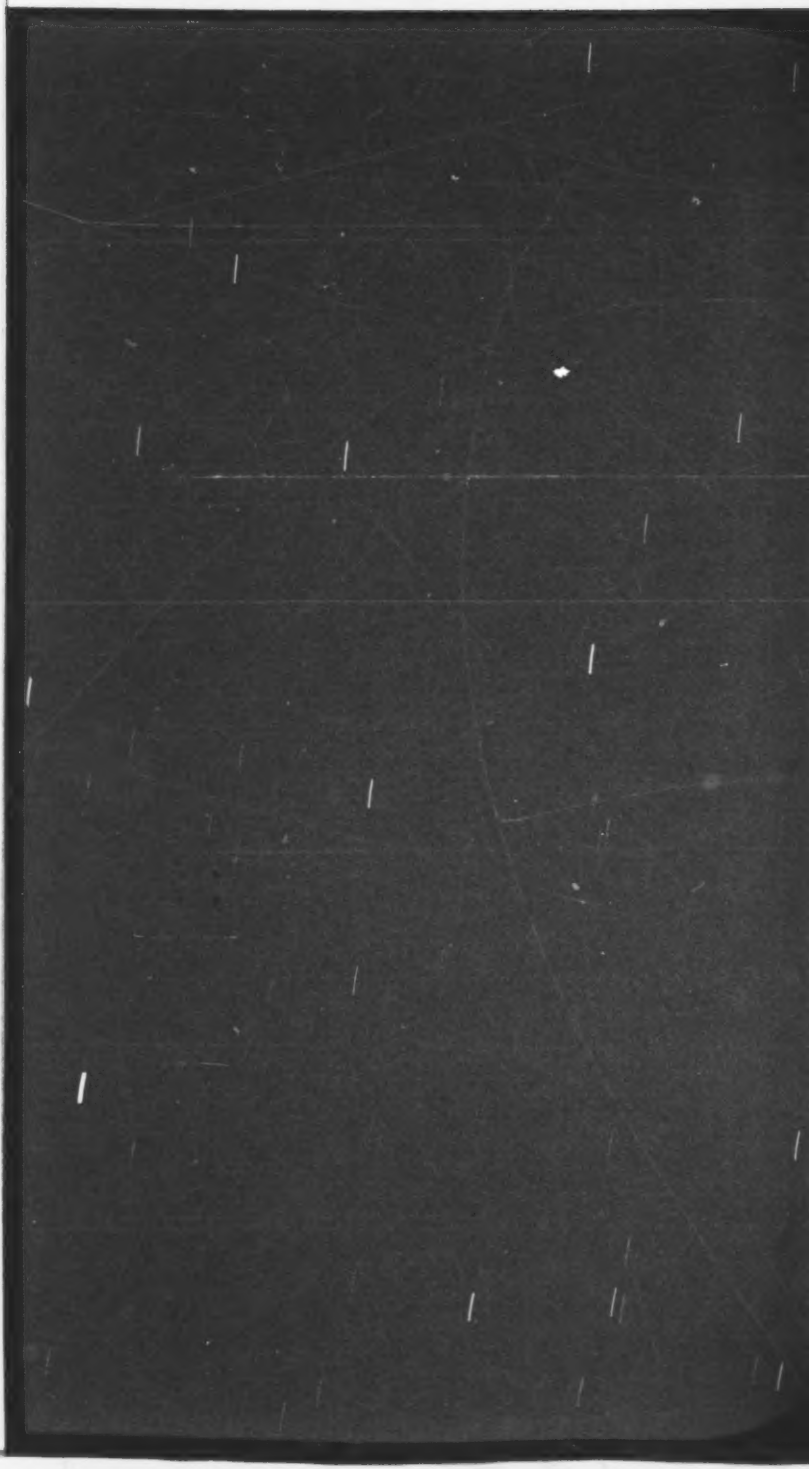

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In The

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No. 128

IN RE BARBARA BURRUS, et al.,

Petitioners

ON WRIT OF CERTIORARI TO THE
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BRIEF
FOR THE STATE OF NORTH CAROLINA

Respondent.

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported at 275 NC 517, 169 SE 2d 879 (A 324-344). The opinion of the North Carolina Court of Appeals in In Re Burrus is reported at 4 NC APP 523, 167 SE 2d 254 (A 303-315); the opinion in In Re Shelton is reported at 5 NC APP 487, 168 SE 2d 695 (A 318-320).

JURISDICTION

The judgment of the Supreme Court of North Carolina was docketed on October 16, 1969 (A 345). Petitioners' Petition for Writ of Certiorari was filed on July 12, 1969, and granted April 20, 1970 (A 346). This case involves the application of the Sixth and Fourteenth Amendments to the Constitution of the United States.

QUESTION PRESENTED

WERE PETITIONERS' RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS VIOLATED WHEN THEY WERE DENIED TRIAL BY JURY, ON THE ISSUE OF THEIR DELINQUENCY IN JUVENILE COURT PROCEEDINGS WHICH COULD HAVE RESULTED IN THEIR INCARCERATION FOR PERIODS OF FROM SIX TO TEN YEARS?

STATEMENT

This case consists of approximately forty-six cases which arose on separate petitions charging each juvenile with one of various wilful and unlawful acts committed on different dates and different occasions in Hyde County, North Carolina. (A 143, 165, 189, 210, 240, 248, 255, 261, 268, 285 and 292) In some instances, more than one petition was filed so that the same juvenile was charged with more than one of the wilful and unlawful acts alleged. (e.g. A 2, 29) Pursuant to these petitions, approximately forty-six juvenile summonses were issued, one for each child and his parents or other person having custody of the child, to appear before the judge of the juvenile court for a hearing on the petition alleging delinquency. Different days for the various hearings were set and the place for the hearings was specified. (A 54-97)

On six diffferent occasions in November and December, 1968, these juveniles (with the exception of James Lambert Howard) were observed by State highway patrolmen standing upon a public highway tossing a basketball back and forth and singing, clapping, and marching. (e.g. A 147, 169, 192) "Between September 11 and November 13 they marched practically every day." (A 195) As a result, vehicular traffic was prevented from proceeding in either direction. The juveniles and numerous adults were asked to remove themselves from the road to allow traffic to pass. They either refused to do so or left the roadway and immediately returned. Said juveniles, with numerous adults who were also participating in the un-

lawful conduct, were then taken into custody. After ascertaining the juveniles herein named to be under sixteen years of age, the officers obtained juvenile petitions. (e.g. 145-147, 168, 170, 192)

On or about December 5, 1968, approximately sixteen persons, including James Lambert Howard, were observed in the principal's office of the O. A. Peay School at 10:30 a.m., while school was in session, yelling, pounding objects against the windows, moving furniture, including a metal cabinet, placing a bed against the door, emptying papers on the floor, turning chairs upside down, and generally littering the office with books, papers, a roll of electrical wire, and other items of property belonging to the school. As a result, the school closed before noon. None of the sixteen were students or school personnel. (A 249-253) A petition was filed against James Lambert Howard for his part in this episode. (A 48)

At the hearings, the cases were consolidated into groups, and the District Judge ordered the general public excluded from the hearing room. The same counsel appeared in all cases for the juveniles. (A 143, 165, 189, 210, 240, 248, 255, 261, 268, 285 and 292). After the hearings, a separate, but almost identical order of custody was entered declaring each child to be a delinquent in need of more suitable guardianship. (A 98-143, 288, 295).

On appeal to the North Carolina Court of Appeals, the cases were lumped into one record. The North Carolina Court of Appeals held that, on the constitutional point which is pertinent to the case as it now stands, a juvenile was not entitled to a jury trial. (A 303, 318) Petitioners thereupon appealed to the North Carolina Supreme Court. (A 300, 316)

On appeal to the North Carolina Supreme Court, it was made to appear that the factual situation in two additional cases, involving juveniles Selma Shelton and John Green Cunningham, were substantially identical to the factual situa-

tion in the case of In Re Burrus, et al, and the North Carolina Supreme Court ordered a consolidation (A 322) and heard all the cases as one appeal. Thereafter, the Court held, that under the Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, §17 of the Constitution of North Carolina, a juvenile was not entitled to a jury trial in a juvenile court proceeding on the issue of his delinquency. However, the Court did modify the District Court's order by striking its commitment provisions on the basis that the judge exceeded his disposal authority. The probationary part of the order was therefore affirmed. (A 323, 324) From that judgment, the petitioners petitioned this Court for a writ of certiorari.

SUMMARY AND INTRODUCTION

Although the *parens patriae* concept of juvenile justice has been criticized and severely limited in its application to the juvenile courts, still, it has residual validity. This residual validity when applied to the adjudicatory stage embraces the rehabilitative possibilities that arise there. One important rehabilitative factor, which is in play at the adjudicatory hearing, is confidentiality.

The juvenile court system as an institution is essential to our society. Hence all three stages of this system should be preserved. It is beyond question, however, that those due process safeguards which are compatible with the system should be integrated into it. But a ruthless application of DUNCAN will destroy it.

Lastly, the Fourteenth Amendment should not strike down a separate juvenile justice system based upon considerations pertinent only to children. The due process standards of the Fourteenth Amendment vary with the subject matter and the necessities of the situation. Thus, when the impact of juries on the juvenile environment is analyzed in depth, it is found that bench trials are more compatible with the juvenile court. Indeed, it is even likely that bench trials may serve the pur-

poses of fundamental fairness more adequately than juries. At any rate, an in-depth analysis reveals that jury trials are just not necessary in this setting. And although a delinquency proceeding may in fact be comparable in seriousness to a felony prosecution from a loss of liberty standpoint, yet there are still legitimate differences between the two prosecutions which the Fourteenth Amendment should reflect. Hence, juvenile due process does not include trial by jury.

ARGUMENT

THE PETITIONERS' RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS WERE NOT VIOLATED, WHEN THEY WERE DENIED TRIAL BY JURY ON THE ISSUE OF THEIR DELINQUENCY IN JUVENILE COURT PROCEEDINGS WHICH COULD HAVE RESULTED IN THEIR INCARCERATION FOR PERIODS OF SIX TO TEN YEARS.

At common law there was a conclusive presumption that a child under seven years of age was incapable of committing crime—he was not capable of *mens rea*—and the same presumption existed to the age of fourteen as to minor offenses. PEE v US, 274 F 2d 556, 558 (D.C. Cir. 1959). Between seven and fourteen, and as to graver crimes, there was also a presumption against the ability to commit them; rebuttable, however, on clear and convincing proof that the child possessed the knowledge and discretion requisite for legal accountability. STATE v BURNETT, 179 NC 735, 102 SE 711, 713 (1920). Thus at common law, children above age seven were treated as adults.

> "They were given the same legal protection and the same punishments as adults. This system prevailed, with various modifications, in this country until the early part of the twentieth century. The constitutional guarantees were equally applicable to juvenile offenders and to adults. But then, a tidal wave of reform, put in motion by such persons as Judge Julian Mack and the leaders of the Jane Addams

School, resulted in a national outcry against the resulting barbarism, as it appeared to them to be, of treating children and juveniles the same as adults. So, in all the jurisdictions under the American flag, separate systems of courts and separate sets of principles were devised for juveniles, usually including those up to eighteen years of age." Fortas, *Equal Rights—for whom?* 42 NY UL Rev 401 (1967) at 405-06; and In re JOHNSON, 254 Md 517, 255 A 2d 419, 421 (1969).

THE THEORY OF JUVENILE COURTS

The aim of the adult criminal process is the imposition of stigma and pain for the purposes of punishment, deterrence, or reformation. Paulsen, *KENT v UNITED STATES: The Constitutional Context Of Juvenile Cases,* 1966 Sup Ct Rev 167, 173-174. It may be said, therefore, that the adult criminal system has two characteristics; the proceeding is formal by nature, and punishment is the primary purpose. Rubin and Shaffer, *Constitutional Protections for the Juvenile,* 44 Denver Law Journal 66, 67. These qualities of a criminal prosecution historically gave rise to special procedural protections, some of which are in our Bill of Rights.

Now crime and punishment are not the primary business of the juvenile court system. STATE v TURNER, (Ore) 453 P 2d 910, 913 (1969). Under this system, juvenile status becomes a basis upon which a youthful offender can plead diminished responsibility for his unlawful act. KEMPLEN v MARYLAND, ... F 2d ....., (No. 13, 290, decided May 22, 1970, 4th Cir). Actually, juvenile court jurisdiction confers "special rights and immunities." Indeed, it protects the juvenile against the consequences of an adult conviction such as loss of his civil rights and disqualification for public employment. KENT v US, 383 US 541, 16 L Ed 2d 84, 95, 86 S Ct 1045 (1966).

The juvenile court system is designed to be rehabilitative

at its adjudicatory stage as well as at its other stages, for rehabilitation is the juvenile court's polar star. Hence, the theory that underpins present juvenile court procedure is that publicity with its attendant stigma does not deter juvenile misbehavior but, on the contrary, interferes with the possibility of rehabilitating the offender. It is believed, though it has never been empirically demonstrated, that notoriety tends to scar, rather than to scare, and handicaps a child's prospects for future adjustment and law-abiding behavior. Moreover, it is thought that focusing public attention and disapproval on a juvenile miscreant takes unfair advantage of a youngster who still has not reached the age of complete discretion. In re AGLER, 19 Ohio St 2d 70, 249 NE 2d 808, 810 (1969); and Geis, *Publicity and Juvenile Court Proceedings*, 30 Rocky Mount Law Review 101, 102.

Secrecy in the juvenile court was therefore developed as a device to protect the young individual against exposure to the cruelty of an aroused community while providing rehabilitative measures. If the rehabilitative process was to have any hope of success, secrecy was said to be essential. Polow, *The Juvenile Court: Effective Justice or Benevolent Despotism?*, 53 A.B.A.J. 31, 33.

It cannot be said that protection from stigma is not a legitimate consideration, for it is elementary that our society values a person's good name. As a consequence, in a criminal prosecution the accused has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he will be stigmatized by the conviction. In re WINSHIP, ... US ....., 25 L Ed 2d 368, 375, ... S Ct ..... (1970). Hence, its founders designed the juvenile court system to protect a child from even the accusation of delinquency, on the theory that the state should not damage a child's reputation as a result of his appearance in juvenile court. As to the delinquent child, he too was to be insulated from society's wrath and stigma. In re AGLER, supra.

KENT v UNITED STATES recognizes these benefits of the juvenile system: "shielded from publicity; and protected from the stigma of criminal conviction, etc." *KENT v UNITED STATES: The Context of Juvenile Cases,* 1966 Sup Ct Rev 167. Indeed, the case itself is an illustration of some of the beneficial aspects of the system. KENT v US, Supra, 16 L ed 2d at 84.

Although this Court has proclaimed its distrust of the protective principle, still it has not said that all policy factors embodied in that principle are beyond its consideration.[1] What Gault did was to hold that the Fourteenth Amendment's standards of due process are applicable to juvenile proceedings. However, it did not say that all of the guarantees of the Bill of Rights need necessarily be applicable. Paulsen, *Constitutional Domestication of the Juvenile Court,* 1967 Sup Ct. Rev 233, 246. Like in KENT, specific approval was given to the processing and treatment of juveniles separately from adults; to classifying a juvenile offender as a delinquent rather than charging him as a criminal; to statutory provisions providing that the adjudication of a child as a delinquent shall constitute neither a civil disability nor disqualification for civil service appointment; to provisions intended to keep juvenile records confidential; and to the practice of conducting proceedings in an informal manner. In re GAULT, supra, 18 L ed 2d at 543, 544; In re JOHNSON, supra, 423.

As the Oregon Supreme Court has observed, it would have been simple to strike down the juvenile codes, and return the child to the criminal courts and thereby afford him the full range of constitutional due process which accompanies a criminal trial. STATE v TURNER, supra. But GAULT specifically recognized that, despite its faults, when loosely administered, the *parens patriae* concept has some residual validity, and expressly refrained from a "root and branch" extirpation of the

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1. See In re GAULT, 387 US 1, 24, 18 L Ed 2d 527, 87 S Ct 1428 (1967), and In re WINSHIP, supra, 25 L Ed 2d at 377, where the Court said that the "claim of secrecy . . . is more rhetoric than reality."

separate juvenile system. Thus, there this Court did not discard the juvenile system, but commanded only that it be tempered with certain procedural safeguards. In re GAULT, supra; and COMMONWEALTH v JOHNSON, 211 Pa Super 62, 234 A 2d 9, 16 (1967).

Lastly, In re WINSHIP, 25 L Ed 2d 368, 372, said that Gault

> "decided that, although the Fourteenth Amendment does not require that the hearing at this stage [adjudicatory] conform with *all the requirements of a criminal trial or even the usual administrative proceeding*, the Due Process Clause does require application during the adjudicatory hearing of 'the essentials of due process and fair treatment.'" (Emphasis supplied) (Citations omitted)

It is obvious that the reason the United States Supreme Court after approximately sixty-five years started to cruise into the waters of the juvenile court is that the practice in that court had not conformed to its theory. As to the court's role in these waters, there appears to be little current dissent from the proposition that the due process clause has a role to play in juvenile court. However, the observance of due process standards, intelligently and not ruthlessly administered should be the rule. Such an application of due process standards will not compel the states to abandon nor displace any of the substantive benefits of the juvenile process. In re ESTES v HOPP, 438 P 2d 205; and In re GAULT, supra, 87 S Ct at 1440.

THE JUVENILE COURT AS A SOCIAL INSTITUTION

For a complete understanding of the impact of jury trials on the juvenile milieu, an analysis of that court as a social institution must be attempted. A state treats its children differently from its adults because the state has an interest in the well-being of its youth. Indeed, this Court, among others, has recognized that the state has an interest "to protect the welfare of children" and to see that they are "safeguarded from

abuses which might prevent their 'growth into free and independent well-developed men and citizens.'" Moreover, "the well-being of its children is of course, a subject within the state's constitutional power to regulate. . . ." GINSBERG v NEW YORK, 390 US 629, 20 L Ed 2d 195, 88 S Ct 1274 (1968), reh den, 391 US 971, 20 L Ed 2d 887, 88 S Ct 29.

> "[t]he state's authority over children's activities is broader than over like actions of adults . . . A democratic society rests, for its continuance, upon the healthy, well-rounded growth of its young people into full maturity as citizens, with all that that implies. It may secure this against impeding restraints and dangers within a broad range of selection." PRICE v COMMONWEALTH OF MASS, 321 US 158, 88 L Ed 645, 64 S Ct 438 (1944), reh den, 321 US 804, 88 L Ed 1090, 64 S Ct 784.

Thus, in this case, it is not only the possible loss of liberty and freedom from stigma interests of the child, but the interests of society in the child and the interests of society in its own safety and future which hang in the balance.

Historically, putting aside for the moment the criminal law or even the law of guardianship, protection of children from their immaturity is not a late nineteenth century or even a twentieth century phenomenon. At common law, an infant's contracts except for necessities were voidable. There a person was classified an infant until attaining the age of twenty-one. 42 AM JUR 2d, Infants, §3; 43 CJS, Infants, §2; 2 Williston, Contracts, §223 (3rd ed 1959); Coke on Littleton, 13th ed (1788), p 172; and PERSONNEL CORP v ROGERS, 276 NC 279, 172 SE 2d 19 (1970). Wasn't this voidability of contracts rule for the purpose of protecting a child from the consequences of his own immaturity?

So, children—yesterday, today, and hopefully tomorrow—are not *sui juris*, and are both legally and as a practical matter, unable to take responsibility for their decisions. Moreover, the parents or guardian do not always represent the child's best

s and are sometimes adverse thereto. In re AGLER, 13. Hence, as a practical matter, only the state has a t interest in forwarding a child's best interest.

Justice Fortas capsuled the idea, when addressing the of Columbia Juvenile Practice Institute, he is reported said that the juvenile court as an institution is essential ociety, for he was not sure that there was much con- e that could be done with offenders who are past child- There is thus a nonjudicial function that the juvenile ust perform; but finding out whether a child committed of which he is accused must be accomplished with fair- tcham and Paulsen, *Address to the District of Colum- enile Practice Institute*, 6 Cr L 2173.

North Carolina Statutory scheme provides that the Dis- urt shall have exclusive, original jurisdiction over de- children under the age of sixteen. GS 7A-277; GS 7A- GS 7A-279.[2] It also has jurisdiction of civil as well as matters. It was then, as well as now, the proper court trial of all civil actions in which the amount in con- is $5,000 or less. GS 7A-243. It had then, as now, e, original jurisdiction for the trial of criminal actions, g municipal ordinance violations, below the grade of GS 7A-272.

inquent child is any child who has committed any offense under state law or under an ordinance of local

Carolina has just undergone a reorganization of its court system. his case arose, the District Court, a new addition to the trial was operating in Hyde County. At that time, both the District nd Superior Court exercised exclusive juvenile jurisdiction under 21, et seq.; GS 7A-277. The Superior Court exercised exclusive tion in those areas of the State where the District Courts had not un to operate. Session Laws of 1969, c 911, s 11. The District Court will be established in all areas of this State on the first Monday mber, 1970. GS 7A-131(3). The 1969 Legislature rewrote GS 110-21, and transferred these provisions to Chapter 7A of the General s, effective January 1, 1970. Session Laws of 1969, c 911, s 11. The on herein is founded primarily upon the current law. However, he law as it applies to this case differs from current law, the rovisions of Chapter 110 of the General Statutes will be noted. manner, a full overview of past and present juvenile jurisdiction cedure is sketched.

government, including violation of motor vehicle laws, or a child who has violated his probation condition.[3] GS 7A-278(3).

When a child of fourteen has committed an offense which constitutes a felony, the judge may, after a probable cause hearing and findings that the needs of the child or the best interests of the state will be served, transfer the case to the Superior Court for trial as in the case of adults. If the alleged felony is a capital offense, after finding probable cause, the case must be transferred to the Superior Court for trial as an adult. GS 7A-280; and GS 110-29(6). A case is commenced by petition and service of summons and petition on the interested parties. GS 7A-281; GS 7A-282; GS 7A-283; GS 110-25; and GS 110-28.

The hearing is to be a simple judicial process designed to adjudicate the issue of delinquency and the judge shall find the facts. A written record of the hearing is maintained. The court is to protect a party's right of written notice, to counsel, to cross examine witnesses, and his privilege of self-incrimination. Also a party has the right to introduce evidence.[4] GS 7A-285.

Juvenile hearings are held at such times and places as the chief district judge[5] shall designate, and at the court's discretion the general public may be excluded from the hearing. GS 7A-285. At the conclusion of the adjudicatory part of the

3. GS 110-21(1) defined a delinquent child as one who violated any municipal or State law or ordinance, and GS 110-21.1 gave the court jurisdiction over violations of the motor vehicle laws.

4. GS 110-29 provided for a summary hearing.

5. The chief district judge, according to present and past practice, has administrative supervision and authority over the operation of the District Courts in his district. His power includes that of arranging schedules and assigning district judges for sessions of district courts. GS 7A-146(1). The practical effect of this provision is to allow some specialization in juvenile court matters. Hence, one judge oftentimes specializes in juvenile cases. In the larger district court districts where there are three or more judgeships, GS 7A-147 allows specialized judgeships. This was also true when the case arose. Hence, the District Court is a trial court of general jurisdiction which allows some judgeship specialization. Petitioners' sketch of the system as applicable to this case is, therefore, somewhat inaccurate regards judgeship specialization.

hearing, the court may proceed to the dispositional part of the hearing which may be informal. In all cases the court's order shall be in writing and shall contain appropriate findings of fact.[6] GS 7A-285. Any child or his representative may appeal from a District Court adjudication to the North Carolina Court of Appeals. GS 7A-289; and GS 7A-35.

Now where the court finds that a child should be detained in secure custody for the community's protection or in the best interests of the child, before or after a hearing on the merits, the child may be detained in a juvenile detention home or, if no home is available, in a separate part of the local jail which meets the standards of a home. The child cannot be held there more than five days without a hearing on the merits, and after such hearing, only in accordance with a written court order.[7] GS 7A-286 (3); and GS 110-30.

After a delinquency adjudication, in appropriate cases, the judge may commit the child to the care of the North Carolina Board of Juvenile Correction. The commitment is to be for an indefinite term, but not beyond the eighteenth birthday of the child as the Board or its administrative personnel may find to be in the child's best interest. However, if the child is engaged in a vocational training program when he becomes eighteen, the Board may extend the indefinite term beyond the eighteenth birthday until the training program is complete.[8] GS 7A-286 (4) (c).

In the adjudicatory stage, if no parent appears with a child, or where the court finds it is in the child's best interests, the court may appoint a guardian of the person who shall continue during the minority of the child. GS 7A-286 (6); and GS 110-37. Lastly, juvenile records are not open to public inspection, and may be examined only by order of the judge except where the

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6. No such provisions appeared in GS 110-29.

7. GS 110-30 is not so elaborate, providing only for a separate lockup.

8. GS 110-29(4) provided only for commitment to a suitable institution.

child, his parents, guardian, custodian and attorney, or other authorized representative of the child shall have a right to examine the child's juvenile record. Moreover, an adjudication of delinquency will not disqualify the child from public office nor be considered as a conviction of any criminal offense. GS 7A-287; and GS 110-24.

SPECIFIC CONTENTION OF THE STATE OF NORTH CAROLINA

The State of North Carolina respectfully contends that the above-outlined statutory schemes adequately promote reliable fact finding. believe that a fair fact-finding procedure in juvenile court is necessary, but we do not believe that the rehabilitative goals of the juvenile system should be compromised in the process. Indeed, constitutional rights need not always be given effect through the same mechanisms which are employed in the criminal courts. We believe the alternative procedure of a bench trial which furthers the rehabilitative goals of the system is justified and constitutional—assuring due process and fundamental fairness in this setting. We believe that the institution of the juvenile court and the individual rights of the juvenile are both so important, that only by this Court's holding juvenile bench trials constitutional can a reasonable reconciliation of the two interests be reached. This we will now attempt to demonstrate.

THE FOURTEENTH AMENDMENT

DUNCAN v LOUISIANA, 391 US 145, 20 L Ed 2d 491, 88 S Ct 1444 (1968), reh. den. 392 US 947, 20 L Ed 2d 1412, 88 S Ct 2270, held that the due process clause of the Fourteenth Amendment guarantees a right to a jury trial in all non-petty criminal cases. BALDWIN v NEW YORK, 38 Law Week 4554 (1970), held that a potential sentence in excess of six months takes an offense out of the petty category. Hence, a broad reading of the term "criminal" would make DUNCAN applicable to the juvenile setting. However,

it is universally held that delinquency proceedings in juvenile court are not criminal. PEE v US, supra, 561. Moreover, most jurisdictions hold that in the absence of a statute which provides for jury trial, an individual charged with being a delinquent has no right under the pertinent state or federal Constitution to demand a jury trial, for most jurisdictions hold that trial by jury applies only to the trial of a criminal action, penal in nature. This is especially so where the investigation is into the status and needs of the child and is aimed at the rehabilitation and restoration of the offender to useful citizenship.[9]

In GAULT, the Court refused to characterize the proceedings as either civil or criminal. The first footnote in WINSHIP said that opinion did not rest on the assumption that all juvenile proceedings were criminal prosecutions. In re WINSHIP, supra, 25 L Ed 2d 372. To hold juvenile court cases criminal would only trade the "civil" label of convenience, criticized in GAULT, for a similar "criminal" label in talismanic substitution of reason.[10] The very purpose of the juvenile code is to avoid treatment of youngsters as criminals and to insulate them from the reputation and answerability of criminals. In re AGLER, supra, 814.

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9. See the Marshalling of Authorities on this point in Anno: Right To Jury Trial In Juvenile Court Delinquency Proceedings, 100 ALR 2d 1241.

10. If juvenile proceedings are labeled "criminal" for purposes of jury trial and DUNCAN ruthlessly applied, strange results may follow. For example, in North Carolina, our Constitution denies an accused the privilege of jury waiver. N. C. Const., Art. I, §13; and STATE v HOLT, 90 NC 749 (1884). Some state courts rule that in the absence of a statute there can be no waiver of jury trial. See, e.g., WILSON v STATE, 16 Ark 601 (1855); STATE v MAINE, 27 Conn 281 (1858); PEOPLE v SMITH, 9 Mich 193 (1861). Other states hold that the waiver of jury trials can be prohibited by statute. See, e.g., ARNOLD v NEBRASKA, 38 Neb 752, 57 NW 378 (1894); In re McQUOWN, 19 Okla 347, 91 P 689 (1907); STATE v BATTEY, 32 R.I. 475, 80 A 10 (1911); STATE v HIRSCH, 91 Vt 330, 100 A 877 (1917); MAYS v. COMMONWEALTH, 82 Va 550 (1886). Many courts hold that waiver is permissible, even in the absence of enabling legislation. See, e.g., State ex rel WARNER v BAER, 103 Ohio St 585 (1921); Ex Parte KING, 42 Okla Cr 46, 274 P 682 (Okla Crim App 1929). Of course, this Court has held that a state statute permitting waiver of a jury trial in criminal cases does not violate the Due Process Clause of the 14th Amendment. HOLLINGER v DAVIS, 146 US 413, 36 L Ed 986, 13 S Ct 105 (1892); and see SINGER v US, 380 US 24, 13 L Ed 2d 630, 636, 85 S Ct 783 (1965).

Hence, the consideration becomes in what manner does due process affect juvenile courts. The answer appears in KENT and GAULT.

> "We do not mean . . . to indicate that the hearing to be held must conform with all of the *requirements of a criminal trial or even of the usual administrative hearing;* but we do hold that the hearing must measure up to the essentials of due process and fair treatment." (Emphasis supplied) KENT v US, supra, 16 L Ed 2d at 97; and In re GAULT, supra, 18 L Ed 2d 548.

Thus, the constitutional safeguards vouchsafed a juvenile in such proceedings should be determined from the requirements of due process and fair treatment, and not by a strict application of the clauses of the Constitution, which in terms apply to criminal cases. PEE v US, supra, and BIBLE v STATE, (Ind) 254 NE 2d 319 (1970). This is in accord with Mr. Justice Holmes, who writing in MOYER v PEABODY, 212 US 78, 53 L Ed 410, 29 S Ct 235 (1909), said:

> "But it is familiar that what is due process of law depends on circumstances. It varies with the subject matter and the necessities of the situation. Thus, summary proceedings suffice for taxes, and executive decisions for exclusion from the country."

In summary, a specific constitutional provision may not be fundamental to a fair trial under all circumstances. Due process of law is a standard which a specific constitutional provision may, depending upon the circumstances, add to, be a part of, or define. In re WINSHIP, supra, 25 L Ed 2d at 380 (concurring opinion); and MURRAY'S LESSEE v HOBOKEN LAND AND IMPROV CO, 18 How 272, 15 L Ed 372 (1855).

In military tribunals, jury trials are not required. WHELCHEL v McDONALD, 340 US 122, 127, 95 L Ed 141, 145, 71 S Ct 146 (1950) (dictum), reh den 340 US 923, 95 L Ed

666, 71 S Ct 356; and KAHN v ANDERSON, 255 US 1, 8, 9, 65 L Ed 469, 474, 475, 41 S Ct. 224 (1921). Likewise, there it is held "[d]ue process of law means that every person brought to justice before a military court martial or commission is entitled to a fair trial, characterized by procedures that are all consistent with our notions of fundamental fairness." US v McMAHON, 6 USCMA 709, 723, 21 CMR 31 (1956). Additionally, one need look no further than equity jurisdiction to determine that trial by jury, guaranteed by the federal and most state constitutions, is not an essential element of due process in all adjudicatory proceedings. It is beyond cavil that an equity decree can be intensively coercive. In re AGLER, supra, 814.

Moreover, the mere fact that a proceeding may result in the deprivation of liberty should not in and of itself compel the conclusion that the proceeding is criminal in nature or like unto criminal proceedings for the purposes of the Sixth Amendment right to jury trial. Under federal law, after only a court hearing, individuals charged with the commission of a crime can be placed in the custody of the Attorney General until found mentally competent to stand trial. GREENWOOD v US, 350 US 366, 100 L Ed 412, 76 S Ct 410 (1956). And although certain state proceedings akin to lunacy proceedings, which result in the deprivation of liberty without the procedural safeguards have been found constitutional [MINN ex rel PEARSON v PROBATE COURT, 309 US 270, 84 L Ed 746, 60 S Ct 523 (1940)] still there is no definite ruling at this time that the due process clause requires juries in either federal or state involuntary commitment proceedings for mental illness or alcoholism. BARRY v HALL, 68 App DC 350, 98 F 2d 222 (1938).

The pivotal question is then: which rules of fairness and basic procedural rights are necessary for due process and fundamental fairness in the juvenile setting? The framing of the question in this manner calls forth a selective due process

standard applicable only to juvenile proceedings. Such a standard allows the extrapolation from KENT, GAULT, and WINSHIP, that jury trials are not necessary for due process and fair treatment in juvenile courts.

The equal protection clause should not invalidate a juvenile court system founded upon bench trials. What this clause appears to require is that any classification of "persons" shall be reasonably relevant to some recognized purpose of good government. "A statute does not violate the equal protection clause merely because it is not all-embracing . . . And it is not open to objection unless the classification is so lacking in any adequate or reasonable basis as to preclude the assumption that it was made in the exercise of the legislative judgment and discretion." WHITNEY v CALIFORNIA, 247 US 357, 71 L Ed 1095, 1103, 47 S Ct 641 (1927). Moreover, one who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. WHITNEY v CALIFORNIA, supra. Thus, the Equal Protection Clause doe not require absolute equality. BREEDLOVE v SUTTLES, 302 US 277, 82 L Ed 252, 58 S Ct 205 (1937). But when a law is passed pursuant to a valid state interest the law will be upheld only if it is necessary and not merely rationally related to the accomplishment of a permissible state policy. McLAUGHLIN v FLORIDA, 379 US 184, 13 L Ed 2d 222, 231, 85 S Ct 283 (1964).

Since it is indisputable that there are legitimate differences between the needs of juveniles and those of adults which should be recognized, the Fourteenth Amendment's application to juvenile hearings should thus reflect these differences.

PRESENT DAY LEGAL AUTHORITIES

A majority of the jurisdictions which have reviewed this question since KENT or GAULT support the view that jury trials are not necessary in the juvenile setting. The cases are: COMMONWEALTH v JOHNSON, 211 Pa Super 62, 234 A

2d 9 (1967); DRYDEN v COMMONWEALTH, 435 SW 2d 457 (Ct App, Ky) (1968); PEOPLE v "Y.O. 2404," 57 Misc 2d 30, 291 NYS 2d 510 (1968); PEOPLE v ANONYMOUS, 56 Misc 2d 725, 289 NYS 2d 782 (1968); In re ESTES v HOPP, 73 Wash 2d 263, 438 P 2d 205 (1968); PEOPLE v K, 58 Misc 2d 526, 296 NYS 2d 404 (1968); In re JOHNSON, 254 Md 517, 255 A 2d 419 (1969); In re STATE OF N. J. in the interest of J. W., 106 NJ Super 129, 254 A 2d 334 (1969); In re BURRUS, 4 NC APP 523, 167 SE 2d 254; and 275 NC 517, 169 SE 2d 879 (1969); STATE v TURNER, (Ore) 453 P 2d 910 (1969); In re ALGER, 19 Ohio St 2d 70, 249 NE 2d 808 (1969); BIBLE v STATE, (Ind) 254 NE 2d 319 (1970); In re TERRY, (Pa) 265 A 2d 350 (1970); and In re FUCINI, (Ill) 255 NE 2d 380 (1970).

A smaller body of case law holds that in the light of GAULT a juvenile is entitled to trial by jury. PEYTON v NORD, 78 NM 717, 437 P 2d 716 (1968); DeBACKER v BRAINARD, 183 Nev 461, 161 NW 2d 508 (1968); NIEVES v US, 280 F Supp 994 (S.D.N.Y.) (1968); SAUNDERS v LUPIANO, 30 AD 2d 803, 292 NYS 2d 44 (1968); and PEOPLE v DAY, 61 Misc 2d 786, 306 NYS 2d 610 (1969)

Eleven jurisdictions provide some form of jury trial by statute. They are: Colo Rev Stat Ann §37-8-3 (1964); DC Code Encyclopedia §16-2307 (1961); Kan Gen Stat Ann §38-808 (Supp 1967); Mich Comp Laws Ann Ch 712 A 17 (1968); Mont Rev Codes Ann §10-604.1 (Supp 1969); Okla Stat Ann Tit 10, §1110 (Supp 1968); SD Comp Laws Ann 26-8-31 (1967); Tex Rev Civ Stat Ann, art 2338-1, §13(b) (Vernon Supp 1968); W Va Code Ann §49-5-6 (1966); Wis Stat Ann §48.25 (2) (1957); and Wyo Stat Ann §14-108 (c) (1961).

Other miscellaneous authorities which have taken the position that jury trials in juvenile proceedings are not necessary or desirable are: Standard Juvenile Court Act, art v, §19 (6th ed); Uniform Juvenile Court Act, §24(a) (1968);

US Dept of Health, Education, and Welfare, Children's Bureau, *Standards for Juvenile and Family Courts* 73 (1966); and The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: *Juvenile Delinquency and Youth Crime*, 38 (1967).

FUNDAMENTAL FAIRNESS

A balancing of equities should reveal what is fundamental fairness in the juvenile setting. A proper balancing should combine the best aspects of the juvenile and criminal procedures into an amalgam which will offer the juvenile the best of both worlds. Only through such a weighing, where the necessity and appropriateness of each constitutional procedural safeguard is weighed, can the introduction of safeguards into the juvenile milieu be reconciled with the original rationale for the independence of the juvenile court.

Constitutionally this approach is sound because balancing, has in the past, played a part in the application of the due process clause:

> "Decisions of this Court concerning the application of the Due Process Clause reveal the necessary process of balancing relevant and conflicting factors in the judicial application of that clause . . . Decisions under the Due Process Clause require close and perceptive inquiry into fundamental principles of our society. The Anglo-American system of law is based not upon transcendental revelation but upon the conscience of society ascertained as best it may be by a tribunal disciplined for the task and environed by the best safeguards for disinterestedness and detachment." BARTKUS v ILLINOIS, 359 US 121, 3 L Ed 2d 684, 79 S Ct 676, 689-690 (1959).

A ruthless application of DUNCAN and BLOOM v ILLINOIS, 391 US 194, 20 L Ed 2d 522, 88 S Ct 1477 (1968), as contended for by the petitioners would exclude the "necessary process of balancing relevant and conflicting factors."

GARRITY v NEW JERSEY, 385 US 493, 17 L Ed 2d 562, 87 S Ct 616 (1967), and GRIFFIN v CALIFORNIA, 380 US 609, 14 L Ed 2d 106, 85 S Ct 1229 (1965), reh den 381 US 957, 14 L Ed 2d 730, 85 S Ct 1797, are said to lay a balancing approach to due process to rest. NIEVES v US, 280 F Supp 994, 1002 (1968). However, those cases deal with the Fifth Amendment's self-incrimination provision, as applied to criminal trials. In contrast, Juvenile Cases are not strictly criminal, and an absolute application of all Bill of Rights' provisions are therefore not necessary. PEE v US, supra. Remember ". . . What is due process of law depends on circumstances." MOYER v PEABODY, supra.

Indeed, doesn't GAULT illustrate the proposition that, in this setting, each constitutional safeguard should be examined to determine if in its absence arbitrary governmental power is possible. It appears, therefore, that as to children, certain constitutional rights are necessary to preserve a minimum degree of procedural fairness, while others are necessary only in varying degrees, or not at all. In re GAULT, supra, 18 L ed 2d 527.

What then is to be balanced? In our constitutional universe, liberty is the rule and restraint the exception. ADKINS v CHILDREN'S HOSP, 261 US 525, 526, 67 L Ed 525, 43 S Ct 394 (1923). Such a maxim demands that special justification be adduced in support of any inroad upon freedom of action. Under the rule of balancing, the court, therefore, balances the apparent detriments of the statute from the point of view of liberty against the anticipated benefit from the point of view of public policy.

> "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation . . . '[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances.' It is 'com-

pounded of history, reason, the past course of decisions . . . ' JOINT ANTI-FASCIST REFUGEE COMMITTEE v McGRATH, 341 US 123, 162, 163, 95 L Ed 817, 848, 849, 71 S Ct 624 (Concurring opinion).

"As these and other cases make clear, consideration of what procedures due process may require under any given set of circumstances begin with the determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action." CAFETERIA WORKERS v McELROY, 367 US 886, 6 L ed 2d 1230, 1236, 81 S Ct 1743 (1961).

Hence, it is this respondent's position that the constitutional balance of social convenience is expressed in this legislation which denies juveniles jury trials. An analysis of jury and bench trials will develop and illustrate the soundness of this contention.

JURY TRIALS

A jury's function may be expressed in two ways: (1) As a guarantor of accuracy in fact finding; and (2) as a political institution which provides the individual a degree of protection against the legislative will and the prosecutor's discretion. "A right to jury trial is granted to criminal defendants in order to prevent oppression by the government . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or over-zealous prosecutor and against the compliant, biased, or eccentric judge." DUNCAN v LOUISIANA, supra, 20 L Ed 2d at 499, 500.

Thus, a jury trial provides the accused with a weapon against political crimes repressive of civil liberties, a weapon juveniles do not generally need. Furthermore, it provides the accused with some protection against punishment which is greater than the community, speaking through the jury, thinks

warranted in a given case.[11] The adjudicatory stage of the juvenile court is not concerned with punishment, but with establishing that a basis exists for the use of state power to care for the child. *Paulsen, Fairness To The Juvenile Offender,* 41 Minn L Rev 547 (1957).

In the final analysis, therefore, it should be the jury's capability as a fact finder which recommends it and not some collateral benefit from its presence. The reason for this is that

> '. . . . the principal original virtue of the jury trial—the limitations a jury imposes on a tyrannous judiciary—has largely disappeared. We no longer live in a medieval or colonial society. Judges enforce laws enacted by democratic decision, not by regal fiat. They are elected by the people or appointed by the people's elected officials, and are responsible not to a distant monarch alone but to reviewing courts, including this one." DUNCAN v LOUISIANA, supra, 20 L Ed 2d at 518 (dissenting opinion).

Certainly, one cannot regard the jury as a better, fairer, more accurate fact finder than a competent and conscientious judge. There may be some judges who do not fit this description, but neither do all juries. DRYDEN v COMMONWEALTH, 435 SW 2d 457 (Ct of App, Ky 1968). Moreover, BRUTON v US, 391 US 123, 20 L Ed 2d 476, 88 S Ct 1620 (1968), is convincing proof that juries cannnot always be trusted. Even DUNCAN acknowledges that trial by jury is not always necessary to insure an impartial trier of fact. DUNCAN v LOUISIANA, supra. Lastly, the right to jury trial is not one of the elements of criminal due process which reformers have pursued adamantly, probably because it does

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11. Mr. Justice Fortas is reported to have said that in juvenile cases there should be no confinement if there is any alternative whatever in a particular case. This, he says, solves the "hocus pocus" of confinement as treatment. Ketcham & Paulsen, *Address to the District of Columbia Juvenile Practice Institute,* 6 Cr L 2173. Clearly, if it is found that judges are adequate due process fact finders, then the possible confinement consideration is not pertinent to the question under debate.

not appear to have any significant correlation to a correct determination of the facts. Ketcham, The Unfilled Promise of the American Juvenile Court, *Justice For The Child* 23 (Rosenheim ed 1962).

Thus, the only thing that can be said is that as applied to juveniles the frequency of difference in decision between a judge and a jury would be relatively insignificant.[12] There is now all the more reason to question whether a jury trial is the most trustworthy instrumentality for protecting the rights of the child, his parents, and the state in a proceeding intended to salvage a child if he is in need of governmental control. STATE v TURNER, 453 P 2d 910, 913.

Moreover, other more important procedural safeguards assure that a miscarriage of justice will not occur. A lawyer promotes effective fact finding. In re GAULT, supra. The reasonable-doubt standard of proof test is a check superior to all others in protecting against an unjust determination of the facts. In re WINSHIP, supra. The compiling of a record, the use of objections and exceptions, written findings of fact and conclusions of law, and the right to appeal, etc.—in general the adversary system—all operate as checks against the judge. Likewise, dismissal, etc. at the intake stage, the right to confront opposing witnesses, including the right of cross examination, the right to have the use of compulsory process in obtaining favorable witnesses, the right of counsel, the right against self-incrimination or the exclusionary rules of evidence, the accused's right to be heard, and the restraints which operate against the judge, all serve as checks on the prosecution.

Finally, delinquency is divided into neither grades nor degrees. Regardless of the nature of the act committed by a child, he comes within the court's jurisdiction. For example, if the delinquency alleged is homicide, there is no scope or

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12. For a short analysis of judge-jury disagreement, see Kalven and Zeisel, *The American Jury*, 55-65 (1966).

cause to decide whether it constitutes first degree murder, second degree murder, or manslaughter. In any event, it is delinquency if the act was committed. The point is that in this environment there just is no need for a sophisticated fact finder. George, *Juvenile Delinquency Proceedings: The Due Process Model*, 40 U Colo Law Review 315, 327.

Although a jury trial would cause the trial to be open, and open trials generally operate as a check upon arbitrary court action, still the advantage would be purchased at the expense of punishing the juvenile through publicity. "In many cases publicity tends itself to constitute a form of punishment, and when it does not, it serves only to provide a deeply troubled youngster an opportunity to flaunt his unregeneracy." The President's Commission On Law Enforcement And Administration Of Justice, Task Force Report: *Juvenile Delinquency And Youth Crime*, 38. Thus, any lack of confidentiality increases the likelihood of permanent stigma, reducing the effectiveness of any treatment administered.

A breach of confidentiality of juvenile trials would not only harm the child, but his family as well. Hence, jury trials in juvenile court should be outweighed by the resultant stigma which handicaps the rehabilitative possibilities. Lest one thinks that stigma as a factor in the equation against juries can be minimized, just how is the judge to control the post adjudicatory speech of jurors. It should, also, be pointed out that studies reveal that the stigma which attaches to the label "delinquent" applies to the dependent and neglected child alike, i.e., to all who come in contact with the juvenile court. California Governor's Special Study Comm'n. on Juvenile Justice Report, pts 1, 11 1960 pp 19-20; and Paulsen, The Delinquency, Neglect and Dependency Jurisdiction of the Juvenile Court, *Justice For The Child*, 45-46 (Rosenheim ed 1962). This revelation portrays the irrationality of public reaction to juvenile court adjudications. If a child is to be protected from such irrational repercussions, he must be protected from a jury.

In the juvenile setting, to require juries would increase the formality of the court. As Dean Paulsen has said: "A jury trial would inevitably bring a good deal more formality to the juvenile court without giving a youngster a demonstratively better fact-finding process than trial before a judge." Paulsen, *Fairness To The Juvenile Offender*, 41 Minn L Rev 547, 559 (1957).

Another problem juries present is that of uniformity in the court. Delinquency other than when a delinquent is charged with some specific criminal act may involve rather ill-defined notions of waywardness and unmanageability (e.g., D.C. Code Encyclopedia, §11-1551), and the maintenance of some semblance of uniform standards among them dictates trial before a jury. In some jurisdictions, for either category of delinquency the juvenile may be committed to an institution. If the jury is applicable to one category, it should be to the others as well, at least insofar as rights are responsive to potential state infringement on the accused's freedom. DRYDEN v COMMONWEALTH, supra.

One of the major problems in treating delinquency today is the so-called "generation gap" between the adults who administer the juvenile justice machinery and the juveniles who are its material.

> "Only a juvenile jury could adequately serve the function of piercing the juvenile front on the one hand and of applying contemporary youthful standards to alleged delinquent conduct on the other. The lay adult judgment is likely to be generally harsher and less understanding than the judgment of adult professionals who have at least some undersanding of the juvenile milieu." George, *Juvenile Delinquency Proceedings: The Due Procen Model*, 40 U Colo Law Review 315, 327.

Thus, jury trials may even impair the fairness of a hearing, because juries may harbor more prejudice toward juveniles

than toward adults. In light of the "generation gap," adult jurors[13] may feel the need to punish rather than to follow the notion of rehabilitation.

Again, the initiation of a jury into the juvenile setting would greatly increase administrative problems, e.g., the selection of and paying of jurors.

> "The jury system can also be said to have some inherent defects . . . It is a cumbersome process, not only imposing great cost in time and money on both the state and the jurors themselves, but also contributing to delay in the machinery of justice." DUNCAN v LOUISIANA, supra, 206 L Ed 2d at 518 (dissenting opinion).

In increasing administrative problems, it would hinder the function of this particular court. It would probably overburden crowded court calendars and prevent a speedy trial. The speed, convenience, and flexibility of the juvenile system would be disminished.[14] In summary, a jury would thus greatly increase administrative and economic problems, lessen the effectivenes of the court, and not particularly enhance procedural fairness. BIBLE v STATE, supra.

THE CONSEQUENCES OF JURY TRIALS

Hence, to afford juveniles the protection of a jury trial "would risk destruction of beneficial aspects of the juvenile process." In re WINSHIP, supra, 20 L Ed 2d at 376. It would mean a retrogression to the ordinary criminal trial. In re GAULT, 387 US at 75 (dissenting opinion).

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13. Since the jury panel must represent the community at large, most jurors, under whatever system they are picked, would probably be adults. GLASSER v US, 315 US 60, 86 L Ed 680, 62 S Ct 457 (1942).

14. Speed, convenience, and flexibility may by themselves be entitled to no weight in the calculus of this Court's past decisions. BALDWIN v NY, supra; FAY v NOIA, 372 US 391, 9 L Ed 2d 837, 83 S Ct 822; and GIDEON v WAINWRIGHT, 372 US 335, 9 L Ed 2d 799, 83 S. Ct 792 (1963). But, when grouped with the other factors herein discussed, they are, in the aggregate, entitled to some weight. In re WINSHIP, 25 L Ed 2d at 376.

> " . . . (T) here is no automatic congruence between the procedural requirements imposed by the process in a criminal case, and those imposed by due process in juvenile cases. It is of great importance, . . . that procedural strictures not be constitutionally imposed that jeopardize 'the essential elements of the state's purpose' in creating juvenile courts."

Jury trials may not interfere with the worthy goal of rehabilitating the juvenile, but they will make a significant difference in the extent to which a juvenile is stigmatized as a "criminal" because he has been found to be a delinquent, and burden the juvenile courts with a procedural requirement which will make juvenile adjudiction significantly more time consuming or rigid. In re WINSHIP, supra, 20 L Ed 2d at 381 (concurring opinion).

> Moreover, . . . "if the adjudication of 'delinquency' must be by a jury with all the procedures of a criminal trial, then certainly many of the immunities granted to minors will have been abolished. Among these, one considered most essential to the welfare of the child and in the interest of society, is that of secrecy. There can be no secrecy with the jury trial. It is obvious . . . that if there must be a fact-finding determination of delinquency by a jury, the first step has been taken in abolishing the difference in concept of treatment between juveniles and adults." PEYTON v NORD, 78 NM 717, 437 P 2d 716, 727 (1968) (concurring and dissenting opinion).

The respondent does not believe this Court will condone such a result, for in WINSHIP it said that the infusion of the reasonable doubt standard would not "compel the states to abandon or displace any of the substantive benefits of the juvenile process." In re WINSHIP, supra.

Hence, this respondent respectfully urges this Court to hold that a juvenile is to be afforded the benefit of an informal hearing at which rules of fairness and basic procedural rights are

observed, and that on balance bench trials are more consistent with the premises of the proceedings. In re AGLER, supra.

BENCH TRIALS

The State of North Carolina does not contend that a juvenile does not have a right to a judge who has no interest in the case, and who has not been prejudiced by earlier events. In re MURCHISON, 349 US 133, 99 L Ed 942, 75 S Ct 623 (1955). The adult system of criminal trials is arranged so that those who pass upon preliminary matters rarely make the final adjudication as well. Due process, therefore, may demand that the trier of fact should not be acquainted with any of the facts of the case or have knowledge of any of the circumstances, either through officials in his own department or records in his possession. Matter of REIS, 7 Cr L 2151 (4-14-70, R.I. Fam Ct.). The State of North Carolina contends that any problems this aspect of due process may present can be solved by some sort of bifurcated hearing without requiring a jury's intervention. This aspect of juvenile bench trials should present no real problem.

In regards to the fundamental fairness of a bench trial, recall that DUNCAN specifically states that it does not question the fairness of trial by judge where a jury is waived. It follows then that when the constitutional right to a jury is waived in criminal proceedings, the procedure which remains must itself be fair. There must therefore be some degree of fairness in trial by a judge. Hence, without proof of judicial partiality, it is this respondent's position that it should not be assumed that bench trials are unfair, or that they do not measure up to the essentials of due process in the juvenile setting. It thus seems wrong to assume that a child cannot receive a fair trial before a juvenile court judge.

The respondent would like to make one other point clear. In GAULT, this Court saw fit to break a juvenile proceeding down into three separate stages, the intake stage, the adjudicatory stage, and the dispositional stage. Now, post-adjudicatory

exposure is an altogether distinguishable problem from adjudicatory exposure and should not be used as a justification for striking down adjudicatory confidentiality. We do not believe that this suit should be used as a vehicle for striking down adjudicatory confidentiality, because of the pre or post-hearing abuses in the juvenile system as a whole. Rather, a suit directly challenging such an invasion of that right to privacy should be the proper vehicle. Moreover, such abuses as occur in the post-hearing stage, or even in the intake stage, can be remedied by legislative acts of expungement, etc., which are made effective. See, for example, Cal. Welfare and Inst'ns Code §781; Ariz Rev Stat Ann §9-2819 (1956); and Mo Stat Ann §211.321 (3) (1962).

CONCLUSION

Finally, respondent contends that the decision in this case should turn upon this Court's answer to the following question: "Whether the presence of the jury in a juvenile case contributes to a significantly substantial reduction in possible margin of error so as to outweigh the possible harm to the child from participation in such a trial, and the disruption of the juvenile system as conceived?" We contend it does not.

The crucial distinction between juvenile loss-of-liberty cases and adult loss-of-liberty cases is that the juvenile law is dealing with a child and not with an adult. The difficult problem, therefore, is whether this Court can give the child all the rights of an indicted adult without at the same time abandoning the the residual validity of the *parens patriae* concept of juvenile justice. The respondent earnestly contends that the difference between a child and an adult justifies constitutionally the present-day difference in fact finders.

Respectfully submitted,

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